

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

	x	
	:	
THE CITY OF HUNTINGTON,	:	Civil Action
	:	
Plaintiff,	:	No. 3:17-cv-01362
	:	
v.	:	
	:	
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

	x	
	:	
CABELL COUNTY COMMISSION,	:	Civil Action
	:	
Plaintiff,	:	No. 3:17-cv-01665
	:	
v.	:	
	:	
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

BENCH TRIAL - VOLUME 8  
BEFORE THE HONORABLE DAVID A. FABER, SENIOR STATUS JUDGE  
UNITED STATES DISTRICT COURT  
IN CHARLESTON, WEST VIRGINIA

MAY 12, 2021

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Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1 PROCEEDINGS had before The Honorable David A. Faber,  
2 Senior Status Judge, United States District Court, Southern  
3 District of West Virginia, in Charleston, West Virginia, on  
4 May 12, 2021, at 9:00 a.m., as follows:

5 THE COURT: Dr. McCann, we'll ask you to come  
6 forward, sir.

7 Do you have anything else, Mr. Schmidt?

8 MR. SCHMIDT: A little bit more, Your Honor, if I  
9 may. May I proceed?

10 THE COURT: Good morning, Dr. McCann.

11 THE WITNESS: Good morning, Your Honor.

12 MR. SCHMIDT: May I proceed, Your Honor?

13 THE COURT: Yes.

14 MR. SCHMIDT: Thank you.

15 BY MR. SCHMIDT:

16 **Q.** Dr. McCann, I'm going to try to briefly wrap up the  
17 final lines of questioning. Thanks for bearing with us  
18 for yet another day.

19 I'd like to pick up on the discussion we had yesterday  
20 about ARCOS data and what you, what you were able to learn  
21 or not learn about what DEA can do with their ARCOS data.

22 And I want to return to your testimony about the fact  
23 that you looked at some DEA documents by showing you  
24 something from the DEA website that was a presentation in  
25 2011.

1 MR. SCHMIDT: May I approach, Your Honor?

2 THE COURT: Yes.

3 THE WITNESS: Thank you.

4 MR. SCHMIDT: Pleasure.

5 BY MR. SCHMIDT:

6 Q. And if we could, Dr. McCann, let's just put the  
7 front page up on the screen. This is Defendants' West  
8 Virginia 642 Exhibit. On the front screen we see the  
9 DEA logo and you can see this is a presentation about  
10 ARCOS. Do you see that?

11 A. Yes.

12 Q. Turn to the second page. The presentation was given in  
13 2011 by a DEA agent named Kyle Wright, Unit Chief, Targeting  
14 and Analysis with responsibility for ARCOS. Are you  
15 familiar with Mr. Wright?

16 A. No.

17 Q. You didn't -- he wasn't one of the folks you talked to  
18 or had communications with?

19 A. I didn't know any of the individuals' names, but that  
20 name doesn't ring a bell.

21 Q. Did you read his testimony in this case?

22 A. No.

23 Q. Let's look at Page 16, please. Do you see where it  
24 says "trends, sample charts"?

25 A. Yes.



1       **Q.**   And then if you look after this -- after that page do  
2       you see that there's a series of illustrative charts that  
3       he's put together for his 2011 presentation?

4       **A.**   Yes.

5       **Q.**   If you look at the first one on Page -- and I'm using  
6       the page numbers in the bottom left corner after the exhibit  
7       number, Page 17 which is also up on the screen.

8       **A.**   Yes.

9       **Q.**   Do you see that? And do you see that this shows that  
10      the DEA was able to use ARCOS data to track state and  
11      national trends month over month?

12      **A.**   That ability seems to be illustrated here. I don't  
13      know if this reflects actual data or not. But the ability  
14      or the concept appears to be illustrated here.

15      **Q.**   And, by the way, do you see how these numbers, the U.S.  
16      and the state level are, are going up in this illustration?

17      **A.**   Yes.

18      **Q.**   Are you -- as part of your work, did you study the DEA  
19      quota, the limit that the DEA sets on the amount of  
20      prescription opioids that manufacturers can make in a given  
21      year?

22      **A.**   No.

23      **Q.**   Did you study the fact that the quota always rose  
24      throughout the time that you say distribution was rising?

25      **A.**   No.

1       **Q.**    Do you have an understanding as to the fact that when  
2       the DEA sets the quota, they're setting it based on  
3       estimated medical, scientific research dates?

4       **A.**    I'm not aware of how they set the quota.

5       **Q.**    Okay. Let's continue on to Page 18, please. Do you  
6       see that this indicates ARCOS analysis on a per capita  
7       basis?

8       **A.**    At least illustrates that, yes.

9       **Q.**    If we turn to Page 20, do you see that this illustrates  
10      using ARCOS data to conduct analyses at a zip code level  
11      including whether a given zip code is above or below average  
12      or average?

13      **A.**    Yes.

14      **Q.**    If we turn to Page 21, do you see that this shows the  
15      DEA using ARCOS data to analyze distribution at a county  
16      level, again in terms of whether it's average, above  
17      average, or below average?

18      **A.**    Yes.

19      **Q.**    And if we look at 24, just as a final illustration, do  
20      you see that this shows the DEA using ARCOS data to analyze  
21      a specific type of prescription opioid with a specific  
22      pharmacy, again comparing that pharmacy to, in this case,  
23      the state average and the U.S. average?

24      **A.**    Yes.

25      **Q.**    Okay.

1 MR. SCHMIDT: For good order, Your Honor, we'd  
2 move this into evidence, Defendants' West Virginia 642.

3 MR. MOUGEY: We object, Your Honor. There's no  
4 foundation laid. The witness has never seen the document.  
5 You've ruled already multiple times getting third-party  
6 documents in through an expert witness is inappropriate.

7 THE COURT: Well, I think he can question him  
8 about it. Overruled.

9 Go ahead, Mr. Schmidt.

10 MR. MOUGEY: I'm sorry. I thought Mr. Schmidt  
11 just moved to enter it into evidence as opposed to  
12 questioning about it.

13 THE COURT: Did you move it into evidence?

14 MR. SCHMIDT: Yes, I did, Your Honor.

15 THE COURT: How is it admissible through this  
16 witness?

17 MR. SCHMIDT: I think it's the type of DEA  
18 document he looked at in terms of educating himself about  
19 ARCOS and learning how ARCOS works.

20 THE COURT: Was he able to specifically identify  
21 it?

22 MR. SCHMIDT: He was not. And I'll ask the  
23 question and maybe if he can't identify it, I'll move it in  
24 through someone else.

25 BY MR. SCHMIDT:

1       **Q.**    Have you seen this document at all? Did you look  
2       at this document in terms of coming to this, these  
3       opioid cases not knowing about ARCOS and trying to learn  
4       about ARCOS and what DEA could do about it?

5       **A.**    No, not this document or any other PowerPoint  
6       presentation on the DEA website.

7               MR. SCHMIDT: Then I'll reserve that, Your Honor.

8               THE COURT: All right.

9       BY MR. SCHMIDT:

10       **Q.**    Let's go to that matrix that you were asked about.  
11       Let's go to the matrix if we could, if I could just get  
12       my copy.

13              Do you have yours in front of you, sir?

14       **A.**    I do, yes.

15       **Q.**    Okay. It's P-43225. And I want to just quickly orient  
16       us to this document.

17              If we go to Page 13 of the document, we see McKesson  
18       for oxycodone and -- let me see if I can make this work  
19       again.

20              We see McKesson oxycodone, 2006 to 2014, national, West  
21       Virginia, Huntington averages, the four pharmacies we've  
22       talked about in Huntington, four Rite-Aid pharmacies, and  
23       then a number of pharmacies outside of Huntington, outside  
24       of Huntington/Cabell. Is that correct?

25       **A.**    Yes.

1       **Q.**   And some of these pharmacies outside of  
2       Huntington/Cabell are in West Virginia. One is in Ohio.  
3       One is in Kentucky. Correct?

4       **A.**   Yes.

5       **Q.**   If we then go to Page 16 -- and this chart, in  
6       particular, continues for a few pages. And if we go to Page  
7       17, there's a new chart. This time it's hydrocodone, same  
8       national, West Virginia -- not the same averages. Now  
9       they're for hydrocodone, but national, West Virginia, and  
10      Huntington averages; correct?

11      **A.**   Correct.

12      **Q.**   Same four pharmacies; correct?

13      **A.**   Correct.

14      **Q.**   And then, again, you've got a group of pharmacies.  
15      Some of them are the same as for oxycodone. Some of them  
16      are different. Correct?

17      **A.**   Correct.

18      **Q.**   Did you select these pharmacies for inclusion on the  
19      chart, both these ones on Page 16 and the ones that are on  
20      Page 13?

21      **A.**   No.

22      **Q.**   Did you personally select them?

23      **A.**   No.

24      **Q.**   Who selected them?

25      **A.**   My understanding is counsel.

1 Q. And what was the criteria you understand counsel used  
2 to select them?

3 A. I don't know.

4 Q. Our best estimate is that these are literally the  
5 pharmacies in West Virginia, -- let's go back to 13 if we  
6 could, please -- in West Virginia and then in nearby parts  
7 of Ohio and Kentucky that have the highest monthly averages  
8 that could possibly be found. Do you know if that's true or  
9 not?

10 A. No, I don't.

11 Q. What about the ones in Huntington/Cabell? Do you know  
12 why those ones were selected by counsel?

13 A. No.

14 Q. If I tell you we believe those are the ones that had  
15 the highest overall volume, do you know whether that's true  
16 or not?

17 A. No.

18 Q. So to dig into these numbers a little bit, if -- let me  
19 ask you to look at just one thing if I may, Dr. McCann. If  
20 I look at the numbers for oxycodone in Huntington/Cabell, do  
21 you have that number there in front of you? The  
22 2.8 million?

23 A. Yes.

24 Q. And if we go to Page 16 and do the same for the  
25 1.6 million, Huntington/Cabell, do you see that number?

1       **A.**    I do, yes.

2       **Q.**    You can tell by looking at those numbers that you've  
3       again excluded the V.A. Hospital shipments as well as some  
4       other shipments; correct?

5       **A.**    Right, to McKesson's credit. I'm focusing only on the  
6       retail and chain pharmacies not including the roughly  
7       80 percent of the shipments that came to the V.A.

8       **Q.**    Now, if we stick with this slide and -- 16 and look at  
9       the average monthly hydrocodone shipments into  
10      Huntington/Cabell County, it's 2,102; correct?

11      **A.**    Yes.

12      **Q.**    That's roughly half the levels, or more than half the  
13      levels of West Virginia and roughly half the levels  
14      nationally; correct?

15      **A.**    Correct.

16      **Q.**    If we go back to 13 and look at the same data for  
17      oxycodone, it's a little higher in terms of the average for  
18      Huntington-Cabell, the national, and West Virginia, but  
19      they're close; correct?

20      **A.**    They're about the same as the average. Rather than  
21      half as much as it was for hydrocodone, they're roughly the  
22      same average within Huntington City and Cabell County as for  
23      the state and for the country.

24      **Q.**    Okay. You spent some time yesterday talking about the  
25      Rite-Aid pharmacies in detail, so I'm not going to go back

1 into those pharmacies. I would like to ask you just a few  
2 questions about the other pharmacies.

3 And I counted 16 pharmacies between Page 13 and Page 16  
4 that were unique and not in Huntington/Cabell. Is that the  
5 correct count?

6 **A.** I didn't count them, but that sounds right.

7 **Q.** And that means that on this chart, four-fifths of the  
8 pharmacies you discussed are outside Huntington/Cabell;  
9 correct?

10 **A.** Well, I didn't discuss them all, but you're right. It  
11 would seem that roughly four-fifths of the pharmacies on  
12 these two charts are outside of the City of Huntington and  
13 Cabell County.

14 **Q.** If we look at just to that point I was asking you  
15 about, these being the largest volume pharmacies or largest  
16 average monthly pharmacies that could be found in West  
17 Virginia and the region, if we look at these average numbers  
18 along the second row starting with the 25,002 for Crab  
19 Orchard going all the way over to the 27,876 for Broadway  
20 Clinic, every single one of those is larger than the  
21 national average, the West Virginia average, the  
22 Huntington/Cabell average by several factors. Correct?

23 **A.** Yes.

24 **Q.** In some instances by -- what's the largest variation  
25 just if you could help me with the math? I guess it would



1 be this 27,000 or the 32,000 I guess. What's the variation  
2 between 32,000 and the Huntington/Cabell average?

3 **A.** It's not, not quite eight times as much.

4 **Q.** Okay. Do you agree that, that by definition with that  
5 variation in the numbers they do not reflect the national  
6 average?

7 **A.** Well, I wouldn't compare it to Huntington/Cabell to say  
8 they don't, they don't compare to the national average, but  
9 I agree they're substantially higher than the national  
10 average.

11 **Q.** Okay. Each one of them is outside the national  
12 average. Let me rephrase if I could. Each one of them is,  
13 is higher -- is outside the national average by a factor of,  
14 of several times. Correct?

15 **A.** Correct.

16 **Q.** Each one of them is outside the West Virginia national  
17 average by a factor of several times; correct?

18 **A.** Correct.

19 **Q.** And each one of them is outside the Huntington/Cabell  
20 average by a factor of several times; correct?

21 **A.** Correct.

22 **Q.** Just for completeness, if we go to slide 16, please,  
23 which is the oxycodone numbers, we see the same thing. And,  
24 in fact, here, just to give us a comparison, how much bigger  
25 is this first one, Family Discount, than Huntington/Cabell

1 in terms of factor difference between them? How much larger  
2 is it roughly?

3 **A.** Well, it's more than 50 times as big.

4 **Q.** And, so, same set of questions. And in an effort to  
5 streamline, I'll ask you them all at once. Is it true that  
6 each of these selected non-Huntington pharmacies on Page 16  
7 are larger than the national, West Virginia, and  
8 Huntington/Cabell averages by, by quite a margin?

9 **A.** Yes.

10 **Q.** And it's safe to say that these pharmacies, both on  
11 Page 16 and on Page 13, were not picked because they were  
12 close to the national average, the West Virginia average, or  
13 the Huntington/Cabell average?

14 **A.** I don't know why they weren't picked, but it would seem  
15 they were not picked for that reason.

16 **Q.** Is there anything about these pharmacies that you would  
17 point me to on Page 16 or Page 13 in saying these reflect  
18 national average, county average, state average?

19 **A.** No. As you suggest, I don't think they were intended  
20 to reflect average pharmacies.

21 **Q.** Okay. Let's go back to 13, please. And on Page 13  
22 you'll see that at the top and the same is true on Page 16,  
23 the location of these pharmacies. And that's where you can  
24 see some of them on different counties in West Virginia,  
25 some of them are outside of West Virginia. Do you see that?

1       **A.**    Yes.

2       **Q.**    Do you know of any geographic commonality that led to  
3       the selection of those pharmacies other than the fact that  
4       some of them are in the State of West Virginia and some of  
5       them are close to the State of West Virginia?

6       **A.**    No.

7       **Q.**    Do you know of any geographic commonality between those  
8       pharmacies and Huntington/Cabell other than some of them are  
9       in the State of West Virginia, some of them are close to  
10      West Virginia?

11      **A.**    No.

12      **Q.**    And just to take a concrete example, one of these  
13      pharmacies is a Rite-Aid in Hancock County. Do you see that  
14      one?

15      **A.**    Yes.

16      **Q.**    Do you know where Hancock County is in the State of  
17      West Virginia?

18      **A.**    No.

19      **Q.**    Do you know how far it is from Huntington?

20      **A.**    No.

21      **Q.**    I'm going to ask you, if you could, just to keep that,  
22      that demonstrative in front of you, P-43225. I'm going to  
23      show a map of the State of West Virginia if we could.

24             Do you recognize the State of West Virginia here  
25      with -- we've only highlighted Cabell. Of course,

1       Huntington is crossing the Cabell line. Do you recognize  
2       this as a map of the State of West Virginia?

3       **A.**    Yes.

4       **Q.**    And if we highlight where Hancock is up at the top, do  
5       you know how far away that is from the City of Huntington or  
6       from Cabell County?

7       **A.**    No.

8       **Q.**    If you look back at 43225, the matrix, if we look at  
9       that again and if you go to Page 1 for ABDC, there's a  
10      pharmacy called Moundsville. It's the third non-Huntington  
11      pharmacy listed for ABDC.

12      **A.**    Yes.

13      **Q.**    It's in Marshall County. Do you know how far that is  
14      from Huntington/Cabell?

15      **A.**    No.

16      **Q.**    And let's just keep the map up if we could,  
17      Mr. Reynolds.

18             Could we go back to the map and show where Marshall  
19      County is?

20             And you didn't measure the distance from there to  
21      Cabell, did you?

22      **A.**    I did not.

23      **Q.**    Two more and then I'll, I'll be done with this.

24             If we look back at your exhibit -- let's keep the map  
25      up. But if we look back at your exhibit at Page 13 back to

1 the McKesson section, there's a pharmacy called Four Seasons  
2 in Mercer County. And we can show that on the map just  
3 where that is, Dr. McCann. Do you know how far that is from  
4 Huntington/Cabell?

5 **A.** No.

6 **Q.** And last one. If we look at Page 7 of your chart for  
7 Cardinal, there's a pharmacy called -- there's actually  
8 three pharmacies, but I'll just focus on one in Jefferson  
9 County. There's a pharmacy called CVS 1428 in Jefferson  
10 County. Do you see that on Page 7?

11 **A.** Yes.

12 **Q.** And could we show where Jefferson County is on the map?  
13 That's actually closer to where you work in the Washington,  
14 D.C. suburbs than the 350 miles it is to Cabell. Do you see  
15 that?

16 **A.** I do, yes.

17 **Q.** Is there -- now I'm asking about all these pharmacies  
18 that are outside Huntington/Cabell. Is there any link you  
19 know of between these pharmacies or the others and  
20 Huntington/Cabell? Any geographic link?

21 **A.** Well, with your addendum geographic link, I would have  
22 to say "no" other than they're in West Virginia. There are  
23 other links between them, but geographically the only  
24 commonality I see is that they're in West Virginia.

25 **Q.** And for any of those pharmacies that are outside

1     Huntington/Cabell did you identify any patients from  
2     Huntington/Cabell who went to one of those pharmacies?

3     **A.**    No. We don't have data on that.

4     **Q.**    In your work on McKesson, did you see that it had  
5     supplied over 50,000 pharmacies over the past few decades at  
6     various points in time?

7     **A.**    I don't recall the number for any particular  
8     distributor. I have the numbers for each distributor, so I  
9     had that number in my mind fleetingly perhaps at one time.  
10    I don't recall what the number is. But it might be, it  
11    might be that number higher or lower.

12    **Q.**    Do you know what the order of magnitude is? Is it tens  
13    of thousands?

14    **A.**    Yes, certainly tens of thousands.

15    **Q.**    Okay. And we talked a moment ago about how there are  
16    16 pharmacies outside Huntington/Cabell that are featured on  
17    this matrix?

18    **A.**    Yes.

19    **Q.**    If the number is 50,000, what percentage of those  
20    50,000 national pharmacies were featured on the matrix,  
21    roughly, if you could, 16 over 50,000? And I don't mean to  
22    put you on the spot trying to calculate it. I can give you  
23    the calculator.

24    **A.**    I might prefer a calculator for that, but it's  
25    something like three one thousandths of a percent.

1 Q. And if it's just 10,000, can you give us a rough  
2 estimate?

3 A. If it's just 10,000 -- well, one percent would be 100.  
4 And, so, it would be fifteen hundredths of a percent.

5 Q. Okay.

6 A. So .15 percent.

7 Q. Thank you, Dr. McCann. That's all I have for right  
8 now. I appreciate your time.

9 THE COURT: Ms. Salgado.

10 MS. SALGADO: One minute, please, as we switch our  
11 technical.

12 THE COURT: Yes.

13 (Pause)

14 CROSS EXAMINATION

15 BY MS. SALGADO:

16 Q. Good morning, Dr. McCann.

17 A. Good morning.

18 Q. Thanks for your patience over these last few days. I'm  
19 Suzanne Salgado. I represent Cardinal Health and I'll ask  
20 you just a few more questions.

21 A. Thank you.

22 Q. Dr. McCann, as part of your work as an expert in this  
23 case, you prepared tables that reflect your analysis of the  
24 market share of each of the wholesale distributors in Cabell  
25 County and the City of Huntington. Is that right?

1     **A.**    I don't know if I would describe it as analysis, but  
2     calculations of the market shares.  Again, they're really  
3     subtotals of the data, and we do that for the distributors  
4     for various jurisdictions including Cabell County and the  
5     City of Huntington.

6     **Q.**    Okay.  I'm going to show you one of those charts and  
7     those set of calculations.  It's from your Appendix 9-I and  
8     it's Page 25 of that that I'll bring up here.  But let me  
9     know if you'd like a hard copy and we can provide you with  
10    that as well.

11    **A.**    Thank you.

12    **Q.**    Now, this table presents your analysis -- or excuse  
13    me -- your calculations, subtotals of some of the data  
14    regarding total dosage units of oxycodone and hydrocodone  
15    shipped by all distributors to all dispensers in  
16    Cabell/Huntington from 2006 to 2014; correct?

17    **A.**    Correct.

18    **Q.**    And that analysis, as you said, is based on ARCOS data;  
19    right?

20    **A.**    Yes.  It might be supplemented a little bit with  
21    defendant transaction data, but the primary source is the  
22    ARCOS data.

23    **Q.**    Now, according to your analysis of the ARCOS data and  
24    any supplementation you may have done, from 2006 to 2014  
25    Cardinal Health distributed 17 percent of the oxycodone and



1 hydrocodone shipped to Cabell and Huntington; correct?

2 **A.** Correct.

3 **Q.** And it's your understanding that Cardinal Health  
4 reported those transactions to the DEA in the ARCOS  
5 database; correct?

6 **A.** Correct.

7 **Q.** So Cardinal Health knew about the 17 percent of the  
8 oxycodone and hydrocodone prescription opioids that were  
9 shipped into Cabell and Huntington during that time frame;  
10 correct?

11 **A.** Yes.

12 **Q.** And as far as you know, -- and the DEA -- excuse me --  
13 on the other hand knew about all of the oxycodone and  
14 hydrocodone prescription opioids shipped into  
15 Cabell/Huntington during that time frame; correct?

16 **A.** Correct.

17 **Q.** And I think we discussed this a little bit yesterday,  
18 but as far as you're aware, at least before 2018, other than  
19 the data on the volume -- or excuse me -- other than  
20 Cardinal Health's own shipments, a distributor would not  
21 have had access to the data that other wholesale  
22 distributors reported to ARCOS; correct?

23 I'll rephrase. You're not aware of Cardinal Health  
24 having access to the data of other distributors during this  
25 time frame; correct?

1       **A.**     Correct.

2       **Q.**     Dr. McCann, yesterday you were referring to some  
3       tables -- or excuse me -- a table showing the pharmacies in  
4       Cabell and Huntington that received shipments of oxycodone  
5       and hydrocodone between 2006 and 2014. And I want to go  
6       through one of those.

7             If we could please pull up P-44752 and go to the second  
8       page of that document.

9             I'd like to focus in particular on A-Plus Care Pharmacy  
10       listed here. According to your chart, how many dosage units  
11       of oxycodone and hydrocodone were shipped to A-Plus Care  
12       Pharmacy?

13       **A.**     583,000.

14       **Q.**     And how many MMEs of oxycodone and hydrocodone were  
15       shipped to A-Plus Care Pharmacy according to your chart?

16       **A.**     17,365,587.

17       **Q.**     And A-Plus Care Pharmacy is listed here because it is  
18       in Cabell, right, or it was in Cabell?

19       **A.**     Correct.

20       **Q.**     But you didn't testify about which distributor sold  
21       oxycodone and hydrocodone to A-Plus Care Pharmacy during  
22       Mr. Mougey's questioning of you; right?

23       **A.**     I don't recall discussing this pharmacy.

24       **Q.**     Let me show you a table that you prepared as part of  
25       your expert materials before you came to testify. In

1 particular, I'm going to look at Appendix 9-H to your expert  
2 report and Page 84 of that pdf. This chart that you  
3 prepared reflects opioid shipments to A-Plus Care Pharmacy;  
4 correct?

5 **A.** Yes.

6 **Q.** According to your chart, A-Plus Care Pharmacy received  
7 shipments of oxycodone and hydrocodone exclusively from  
8 Miami-Luken, a different distributor; correct?

9 **A.** Correct.

10 **Q.** According to your chart, A-Plus Care Pharmacy did not  
11 receive any shipments from AmerisourceBergen, Cardinal  
12 Health, or McKesson; correct?

13 **A.** Correct.

14 **Q.** Miami-Luken is not a defendant in this trial, is it?

15 **A.** Not that I'm aware of.

16 **Q.** In compiling your analysis and opinions did you  
17 consider that according to the DEA, A-Plus Care Pharmacy was  
18 the third largest seller of oxycodone in West Virginia for  
19 2014?

20 **A.** I'm sorry. Could you repeat that again?

21 **Q.** Sure. In compiling your analysis and opinions in this  
22 case, did you consider that according to the DEA, A-Plus  
23 Care Pharmacy was the third largest seller of oxycodone in  
24 West Virginia for 2014?

25 **A.** Yes, at least the substance of what the DEA would know

1 because we're both looking at the DEA and, and I -- we're  
2 both looking at the shipments from distributors of oxycodone  
3 and hydrocodone into this pharmacy.

4 I don't, I don't have any knowledge of any statement by  
5 the DEA or any classification or ranking of these  
6 pharmacies.

7 So I guess the direct answer would be -- to your  
8 question would be "no," but I think literally I'd know the  
9 same thing.

10 **Q.** So you were -- you had the information available to  
11 determine that it was one of the largest sellers of  
12 oxycodone in West Virginia for 2014?

13 **A.** Yes. It's reflected in these voluminous appendices.

14 **Q.** But you didn't testify about it during plaintiffs'  
15 questioning of you at trial; correct?

16 **A.** Correct.

17 **Q.** Dr. McCann, some of the charts you presented show  
18 changes in the volume of opioids shipped to particular  
19 pharmacies at particular times. I'm going to walk through a  
20 couple of those.

21 Your analyses revealed that the pharmacy customers that  
22 each distributor serviced changed over time at various  
23 points; correct?

24 **A.** Yes.

25 **Q.** For example, and we'll talk about this in just a moment

1 in a little more detail, the Fruth Pharmacy chain was a  
2 customer of AmerisourceBergen until around 2010 when Fruth  
3 became a customer of Cardinal Health. Do you recall that?

4 **A.** I don't recall the details, but I recall pharmacies,  
5 including Fruth, changing distributors.

6 **Q.** And a distributor's shipments to a particular  
7 jurisdiction may rise or fall depending on how many  
8 customers that distributor serviced in that jurisdiction at  
9 any particular time; correct?

10 **A.** Yes.

11 **Q.** So at times, a distributor's total shipments to a  
12 particular jurisdiction may decrease, at least in part,  
13 because a customer stopped ordering from that distributor  
14 and started ordering from a different distributor; correct?

15 **A.** Yes.

16 **Q.** And, conversely, sometimes a distributor's total  
17 shipments to a given jurisdiction may increase, at least in  
18 part, because a customer started ordering from that  
19 distributor as opposed to a different one; correct?

20 **A.** Yes.

21 **Q.** Let's look back at a chart that you reviewed I believe  
22 on Monday. And that's on P-44711, Page 29.

23 Dr. McCann, this reflects your calculations of  
24 oxycodone and hydrocodone dosage units per capita by  
25 distributors into Cabell and Huntington; is that right?

1       **A.**    Yes.

2       **Q.**    I want to draw your attention to the 2009 and 2010 time  
3       frame. According to your chart, AmerisourceBergen's  
4       distributions of hydrocodone and oxycodone into Cabell and  
5       Huntington decreased around that time frame; is that right?

6       **A.**    Yes.

7       **Q.**    And during that same time frame, Cardinal Health's  
8       distributions increased; correct?

9       **A.**    Correct.

10      **Q.**    And the amount by which AmerisourceBergen's  
11      distributions decreased was roughly similar to the amount by  
12      which Cardinal Health's distributions increased. Is that  
13      fair?

14      **A.**    Yes.

15      **Q.**    And we discussed that you were aware of certain  
16      pharmacies changing suppliers, and I want to talk in  
17      particular about Fruth Pharmacy. You're generally familiar  
18      with the Fruth Pharmacy chain; correct?

19      **A.**    I am, yes.

20      **Q.**    Are you aware it's a family-owned West Virginia based  
21      pharmacy chain that's been in business since the 1950s?

22      **A.**    No, I'm not aware of those details. I've just driven  
23      past some and recognized the sign.

24      **Q.**    You presented some detailed charts showing  
25      distributions to the Fruth Pharmacies in Cabell-Huntington;

1 correct?

2 **A.** Yes.

3 **Q.** And broken down by distributor as to some of those  
4 charts; correct?

5 **A.** Correct.

6 **Q.** I just want to pull up a couple of those examples,  
7 P-44752, Page 15, as well as Page 18.

8 The chart on the left shows your analysis of  
9 hydrocodone shipments to the Fruth Pharmacies in Cabell and  
10 Huntington; correct?

11 **A.** Yes.

12 **Q.** And before 2010, almost all distributions were coming  
13 from AmerisourceBergen based on the data that you present  
14 here; correct?

15 **A.** Yes.

16 **Q.** And starting in around 2010, almost all distributions  
17 were coming from Cardinal Health based on this data; right?

18 **A.** Yes.

19 **Q.** And the chart on the right shows your analysis of  
20 oxycodone shipments to those same pharmacies during the same  
21 time frame; correct?

22 **A.** Yes.

23 **Q.** And, similarly, before 2010 almost all distributions  
24 were coming from AmerisourceBergen and that switches over to  
25 Cardinal Health after that point; is that right?

1       **A.**    Yes.

2       **Q.**    So based on your analysis in these two graphs, the  
3       Fruth Pharmacies shift to Cardinal Health in 2010 didn't  
4       cause the total shipment to Fruth Pharmacies to increase; is  
5       that right?

6       **A.**    Correct.

7       **Q.**    In fact, distributions to them after 2010 generally  
8       appear to decrease over time; correct?

9       **A.**    More clearly so for hydrocodone, but sometime later  
10      almost with respect to oxycodone.

11      **Q.**    And then going back to 44711, Page 29, the Fruth  
12      Pharmacy shift to Cardinal Health did cause Cardinal  
13      Health's total shipments to Cabell and Huntington to  
14      increase because Cardinal Health gained a customer; correct?

15      **A.**    Correct.

16      **Q.**    But the actual shipments to that customer were  
17      relatively unchanged; is that right?

18      **A.**    Correct.

19      **Q.**    Now, sticking with this chart for a moment, I'd like to  
20      draw your attention now to the gray lines that reflect  
21      shipments from distributors other than Cardinal Health,  
22      AmerisourceBergen, and McKesson. Those gray lines start in  
23      2006 and stop in 2014; correct?

24      **A.**    Yes.

25      **Q.**    And that's not because those are the only years in



1 which other distributors shipped oxycodone or hydrocodone to  
2 Cabell and Huntington; correct?

3 **A.** Correct.

4 **Q.** They just are reflective of those years because those  
5 are the only years for which you had ARCOS information;  
6 correct?

7 **A.** Correct.

8 **Q.** And you didn't have any non-ARCOS distribution data  
9 from other distributors not in this courtroom; right?

10 **A.** At least not, not in this jurisdiction, that's correct.

11 **Q.** So -- okay. So 2006 through 2014 were the only years  
12 in this jurisdiction for which you had data for distributors  
13 other than Cardinal Health, AmerisourceBergen, and McKesson;  
14 correct?

15 **A.** Yes, I believe that's correct.

16 **Q.** Focusing now on the red line reflecting distributions  
17 from Cardinal Health, that line goes farther back in time  
18 than all of the other lines, all the way back to 1996;  
19 correct?

20 **A.** Correct.

21 **Q.** And that's because Cardinal Health produced data going  
22 back to 1996 while others did not; right?

23 **A.** That's my understanding.

24 **Q.** The data from ABDC appears to start here around 2002;  
25 correct?

1       **A.**    Yes.

2       **Q.**    And for McKesson, that data goes back to around 2004?

3       **A.**    Yes.

4       **Q.**    So for Cardinal Health, you had at least six years of  
5       data that you did not have for any other distributor; is  
6       that right?

7       **A.**    Correct.

8       **Q.**    And you have no idea how Cardinal Health's  
9       distributions during that time period compare to shipments  
10      from any other distributor; correct?

11      **A.**    Correct.

12      **Q.**    Looking now at the 2014 to '15 time frame, Cardinal's  
13      distributions in 2015 are higher than they were in 2014;  
14      correct?

15      **A.**    I'm sorry. Could you ask that again, please?

16      **Q.**    Sure. Cardinal Health's distributions in 2015 are  
17      higher than they were in 2014; correct?

18      **A.**    Yes.

19      **Q.**    And I believe you testified about this briefly that  
20      you're aware of the -- something about a rescheduling of one  
21      of the drugs, hydrocodone; is that correct?

22      **A.**    Yes.

23      **Q.**    So are you aware that CVS, a chain pharmacy, stopped  
24      distributing hydrocodone products to its own pharmacies in  
25      Cabell-Huntington in late 2014 when that rescheduling

1 happened, and Cardinal Health became the CVS Pharmacy's main  
2 supplier of hydrocodone products after that time?

3 **A.** I don't recall the precise details, but I recall  
4 generally that the chain pharmacies that were  
5 self-distributing stopped self-distributing hydrocodone  
6 around that time and switched to these, these three major  
7 distributors for the hydrocodone needs.

8 **Q.** Okay. Let's look briefly at one of the charts that  
9 reflects some of those more specific distributions.  
10 P-44748, Page 13.

11 THE COURT: Ms. Salgado, I'm sorry. I've got to  
12 interrupt you. We need to make an early court reporter  
13 switch to accommodate one of the other judges, and also my  
14 real-time is on the blink. So --

15 MS. SALGADO: I want to make sure you're  
16 following. We're happy to take a break.

17 THE COURT: Let's keep it to 10 minutes subject to  
18 what the technicians have to do.

19 MS. SALGADO: No problem.

20 (Recess taken at 9:46 a.m.)

21 THE COURT: Okay, Ms. Salgado. Salgado. I keep  
22 mispronouncing your name.

23 MS. SALGADO: No, you got it right.

24 THE COURT: Did I get it right that time?

25 MS. SALGADO: You got it completely right. Thank

1       you.

2                       BY MS. SALGADO:

3       **Q.**     Okay, take two. We're all set. Thank you so much.

4       Welcome back, Dr. McCann.

5       **A.**     Thank you.

6       **Q.**     I want to refer you to one of the charts you put  
7       together regarding distributions to CVS Pharmacies in  
8       Cabell-Huntington building off of what we were just  
9       discussing before the break. So, let's look at P-4478, Page  
10      13, please. So, this chart shows your analysis of  
11      hydrocodone distributions to I believe it's four CVS  
12      Pharmacies in Cabell and Huntington; is that correct?

13      **A.**     Yes.

14      **Q.**     And before October, 2014, most of the hydrocodone that  
15      was being shipped to CVS Pharmacies in Cabell and Huntington  
16      were being self-distributed by CVS itself shown in orange on  
17      the graph, correct?

18      **A.**     Yes. Or yellow, yes.

19      **Q.**     Oh, fair enough. It printed a little orange for me,  
20      but it looks a little yellower there. And the CVS data only  
21      goes back to 2006 because of the time frame of the ARCOS  
22      data, correct?

23      **A.**     Correct.

24      **Q.**     And Cardinal Health's distributions are shown in red  
25      here, correct?

1       **A.**     Correct.

2       **Q.**     And before October, 2014, Cardinal Health was shipping  
3       just a small fraction of the total amount of hydrocodone  
4       going to these CVS Pharmacies, right?

5       **A.**     Yes.

6       **Q.**     And we discussed just before the break that you were  
7       generally familiar with the rescheduling of the hydrocodone,  
8       right?

9       **A.**     Correct.

10      **Q.**     And you're aware of the fact that the DEA moved  
11      hydrocodone combination products from a Schedule III drug to  
12      a Schedule II drug around October, 2014, correct?

13      **A.**     That's generally my understanding, yes.

14      **Q.**     And are you generally aware that there are additional  
15      physical security requirements relating to the distribution  
16      of Schedule II products that do not apply to Schedule III  
17      products?

18      **A.**     No, I'm not aware of those differences.

19      **Q.**     So, the very same month that the hydrocodone -- excuse  
20      me that hydrocodone -- was rescheduled, around October,  
21      2014, as we see in your graph, CVS stopped self-distributing  
22      to its stores in Cabell and Huntington and after that date  
23      Cardinal Health provided most of the distributions, right?

24      **A.**     Correct.

25      **Q.**     And the CVS Pharmacies shipped to Cardinal Health did

1 not cause the total hydrocodone shipments to those  
2 pharmacies to increase, right?

3 **A.** Correct.

4 **Q.** And in general -- or excuse me. The hydrocodone  
5 shipments, according to your graph, tended to go down over  
6 time after October, 2014, correct?

7 **A.** Correct.

8 **Q.** So, this shift did cause Cardinal Health's total  
9 shipment of hydrocodone to increase to Cabell-Huntington in  
10 that time frame because Cardinal Health gained a portion of  
11 CVS's business, correct?

12 **A.** Correct.

13 **Q.** But it didn't cause additional hydrocodone shipments to  
14 go to those pharmacies, right?

15 **A.** Not any more than had been previously shipped by CVS as  
16 a self-distributor, that's correct.

17 **Q.** Okay. Dr. McCann, just moving on to another topic  
18 briefly, you testified that the ARCOS data that you reviewed  
19 appeared to be missing data from Cardinal Health from March,  
20 2008; do you recall that?

21 **A.** Yes.

22 **Q.** You have no idea whether those transactions are missing  
23 because Cardinal Health did not report them, or because of  
24 an error on DEA's end, or some other reason, correct?

25 **A.** Correct.

1       **Q.**     And the absence of that March, 2008 data did not  
2       prevent you from concluding that the ARCOS data accurately  
3       and reliably reflected Cardinal Health's distributions,  
4       correct?

5       **A.**     Correct. I think I may have articulated it in slightly  
6       different ways in different contexts and at different times,  
7       but what I determined was that the shipments from  
8       manufacturers and distributors to dispensers in the ARCOS  
9       data appear to be complete and the data reliable.

10      **Q.**     Let's talk a little bit more about your analysis of the  
11      ARCOS data. Part of your assignment in this case was to  
12      process, validate and augment the ARCOS data produced by the  
13      DEA and internal transactional data produced by defendants,  
14      correct?

15      **A.**     Correct.

16      **Q.**     And you explained in some of your earlier testimony  
17      some of the steps you took to validate that data, including  
18      comparing it against defendants' data, correct?

19      **A.**     Correct.

20      **Q.**     And you also testified about some of the steps you took  
21      to augment the data, right?

22      **A.**     Correct.

23      **Q.**     I want to focus now on some of the steps you took after  
24      that to process the data. You explain in Appendix II of  
25      your report some of the corrections you made to the ARCOS

1 data and, according to your description, you made eight  
2 types of changes to the produced ARCOS data; is that  
3 correct?

4 **A.** They're not all corrections, but -- and I don't recall  
5 the precise number, but there are item -- there's an  
6 itemized list in that appendix of the things that we did to  
7 narrow down the overall dataset to the shipments of opioids  
8 that we then subtotaled.

9 **Q.** Sure. If we could pull up the appendix, please,  
10 Appendix II. I believe it's Paragraph 156. You described  
11 them as eight types of changes, correct?

12 **A.** Correct.

13 **Q.** And one of those changes was excluding certain  
14 transactions that you determined were duplicate transactions  
15 in the ARCOS data, right?

16 **A.** Correct.

17 **Q.** You also checked the accuracy of the calculated base  
18 weight in grams in the ARCOS data and found that some were  
19 incorrectly calculated in ARCOS; is that right?

20 **A.** That's a very tiny number but, yes, some.

21 **Q.** But that's -- that is correct?

22 **A.** Yes.

23 **Q.** And you corrected the calculated base weight in grams,  
24 in particular, I think I'm looking on Paragraph 162 of your  
25 report. 285,891 reported transactions; is that right?



1     **A.**    I don't recall the precise number, but that sounds  
2     approximately right.

3     **Q.**    If we could just pull up Paragraph 162, please, on Page  
4     109. And there it is. So, it says you corrected the  
5     calculated base weight in grams for 285,891 reported  
6     transactions; is that right?

7     **A.**    Yes. The full sentence includes .06% of the total  
8     transactions, that's correct.

9     **Q.**    Right. But I'm just confirming that the number 285,891  
10    is correct; is that right?

11    **A.**    Correct.

12    **Q.**    And you created a table showing all of the exclusions  
13    and corrections that you made to the ARCOS data; is that  
14    right?

15    **A.**    Correct.

16    **Q.**    And in total, let's see, if we could please bring up  
17    the Page 114, the bottom, or we can just leave it there.  
18    You determined it was appropriate to exclude over 61 million  
19    transactions, right?

20    **A.**    Correct.

21    **Q.**    Okay. Good with that. Thank you.

22           Dr. McCann, as to the testimony you have provided  
23    regarding distribution of opioid medications, the only  
24    Cardinal Health information that you reviewed was Cardinal's  
25    distribution data and the DEA data that included Cardinal's

1 distributions, correct?

2 **A.** I think the answer is yes, but I may not understand  
3 your question. Would you ask it again, please?

4 **Q.** Sure. Dr. McCann, as to the testimony you've provided  
5 regarding distribution of opioid medication, the only  
6 Cardinal Health information you reviewed was Cardinal's  
7 distribution data and the DEA data that included Cardinal's  
8 distributions; is that right?

9 **A.** I think very narrowly interpreted to mean in my  
10 analysis of -- or summaries of Cardinal Health shipments, I  
11 only looked at the ARCOS data reflecting those shipments and  
12 the defendant production from Cardinal. I think the answer  
13 is yes, if that's what you mean.

14 **Q.** Yes. You didn't look into how Cardinal Health uses its  
15 own data to monitor its customers' purchases, correct?

16 **A.** Correct.

17 **Q.** And that's the same for ABDC?

18 **A.** Correct.

19 **Q.** And that's the same for McKesson?

20 **A.** Correct.

21 **Q.** Dr. McCann, broadly speaking, you analyzed in various  
22 ways the volume of opioid medications shipped by  
23 AmerisourceBergen, Cardinal Health and McKesson, right?

24 **A.** Yes.

25 **Q.** And your analysis covered the distribution of 14 types

1 of opioid medications, correct?

2 **A.** Yes.

3 **Q.** And much of your analysis focused only on distribution  
4 of two specific opioid medications, oxycodone and  
5 hydrocodone, correct?

6 **A.** I don't think that's correct. I think that out of  
7 roughly 10,000 pages of exhibits to my expert report include  
8 exhibits on -- on all of the drugs, sometimes grouped as 14,  
9 sometimes as 12, sometimes as two, sometimes individually.  
10 I think that roughly 50 or 100 exhibits that we walked  
11 through here in the courtroom, they all dealt with either  
12 oxycodone or hydrocodone. Only a few dealt with all of the  
13 14 drugs.

14 **Q.** Okay. So, you agree that your testimony that's been  
15 elicited by the plaintiffs in court here has largely been  
16 around the distribution of oxycodone and hydrocodone,  
17 correct?

18 **A.** Yes.

19 **Q.** Your analysis and charts do not show us the  
20 non-controlled medications that distributors shipped,  
21 correct, so non-opioid substances or non-controlled  
22 substances?

23 **A.** Correct. I don't have that data, that's correct.

24 **Q.** Are you aware that the data for distribution of  
25 non-controlled substances into Cabell-Huntington was

1 produced by Cardinal Health in this case?

2 **A.** I'm not aware of that.

3 **Q.** Are you aware that it was produced by other defendants  
4 in this case?

5 **A.** I am not aware of that.

6 **Q.** So, the lawyers didn't ask you to do that analysis,  
7 correct?

8 **A.** Correct.

9 **Q.** So, for a pharmacy with a high volume of oxycodone and  
10 hydrocodone shipments into Cabell and Huntington, your  
11 analysis doesn't tell us anything about whether they also  
12 received a high volume of other medications like blood  
13 pressure or cholesterol medications, right?

14 **A.** Correct.

15 **Q.** Moving on to a different topic, Dr. McCann, you're  
16 aware that the DEA regulates the supply chain for controlled  
17 substances, correct?

18 **A.** Right.

19 **Q.** And I believe you talked about it a little bit, but are  
20 you aware that the DEA decides how much of each opioid  
21 medication like oxycodone or hydrocodone can be made by  
22 manufacturers each year?

23 **A.** If you're referring to what I know very generally as  
24 quotas, then the answer is yes. I don't know if that  
25 characterization is consistent with my understanding of the

1       quotas, but I understand the DEA publishes something that is  
2       supposed to put an upper bound on the amount of opioids  
3       produced.

4       **Q.**   And you understand that when the DEA sets a quota, that  
5       authorizes production of a certain amount of medication and  
6       no more, correct?

7       **A.**   That's generally my understanding. I don't really know  
8       anything in any detail about how these quotas work but,  
9       generally, that's my understanding.

10      **Q.**   And are you aware that the DEA is required by law to  
11      set the quota at the amount needed to meet legitimate  
12      medical need?

13      **A.**   No. I don't know what the requirements are for setting  
14      the quotas.

15      **Q.**   But you do understand that distributors cannot ship any  
16      more prescription opioids than are manufactured each year  
17      pursuant to the DEA quota, correct?

18      **A.**   I'm sorry. Could you ask that again please?

19      **Q.**   You understand that distributors cannot ship any more  
20      prescription opioids that are manufactured pursuant to the  
21      DEA quota, correct?

22      **A.**   Well, really independent of the quota, they can't ship  
23      more drugs than are manufactured, that's correct.

24      **Q.**   Are you aware that the DEA increased the quota for  
25      prescription opioids that could be manufactured almost every

1 year from 1993 until 2013?

2 **A.** I don't recall that detail. I recall seeing in perhaps  
3 one of your expert's reports perhaps in an earlier case a  
4 graph of these quotas that appear to be increasing through  
5 time, but I don't recall the details.

6 **Q.** So, you don't -- you're not recalling that, by 2013,  
7 the quota limit for oxycodone was about 40 times greater  
8 than it was in 1993?

9 **A.** Correct.

10 **Q.** But you said you are familiar with graphs showing the  
11 general increase in quotas over time; is that right?

12 **A.** Correct.

13 **Q.** Let's take a look at one of those graphs. Just for  
14 demonstrative purposes, I'm going to show you a graph of the  
15 DEA's aggregate quota for oxycodone over time in kilograms  
16 and this is from the DEA OIG's report, a publicly available  
17 document published in 2019. If we could please pull that  
18 up.

19 So, let's focus on the 1997 to 2010 time period.  
20 According to this graph, in 1997, the quota was less than  
21 10,000 kilograms, correct?

22 **A.** Yes.

23 **Q.** And, in 2010, it was more than 100,000 kilograms,  
24 right?

25 **A.** Yes.

1       **Q.**     Would you agree with me that this chart shows that the  
2       DEA aggregate production quota for oxycodone in 2010 was at  
3       least ten times greater than it was in 1997?

4       **A.**     Yes.

5       **Q.**     You testified about several other charts that showed  
6       distributions of oxycodone and hydrocodone by all  
7       distributors to all dispensers from 1997 to 2019; do you  
8       recall that?

9       **A.**     Yes.

10      **Q.**     Let's pull up Plaintiffs' 44711, Page 4, please. This  
11      is one of your charts and it represents shipments of  
12      oxycodone and hydrocodone reflected in the ARCOS Retail Drug  
13      Summary Reports converted by you into MMEs for the entire  
14      United States, correct?

15      **A.**     Correct.

16      **Q.**     You've testified that this chart showed that from 1997  
17      to 2010 the volume of oxycodone and hydrocodone for the  
18      entire United States increased by approximately ten or  
19      eleven-fold; do you recall that?

20      **A.**     Yes.

21      **Q.**     Let's pull up Plaintiffs' Exhibit 44711, Page 8,  
22      please. This chart represents shipments of oxycodone and  
23      hydrocodone also reflected in the ARCOS Retail Drug Summary  
24      Reports and converted by you into MMEs for the entire State  
25      of West Virginia; is that right?

1       **A.**    Yes.

2       **Q.**    You testified that this chart shows that from 1997 to  
3       2010 the volume of oxycodone and hydrocodone shipped to the  
4       entire State of West Virginia increased also by  
5       approximately ten or eleven-fold; do you recall that?

6       **A.**    Yes.

7       **Q.**    So, the magnitude of the increase was approximately the  
8       same for the State of West Virginia as it was for the United  
9       States as a whole, correct?

10      **A.**    Yes.

11      **Q.**    Let's pull up P-44711, Page 11, please. This chart  
12      represents shipments of oxycodone and hydrocodone also  
13      reflected in the ARCOS Retail Drug Summary Reports and  
14      converted by you into MMEs for the three-digit zip codes in  
15      West Virginia that encompass Cabell and Huntington, correct?

16      **A.**    Yes.

17      **Q.**    And you testified that this chart shows that from 1997  
18      to 2010 the volume of oxycodone and hydrocodone shipped to  
19      the three-digit zip codes that encompass Cabell and  
20      Huntington also increased by approximately ten-fold; do you  
21      recall that?

22      **A.**    Yes.

23      **Q.**    So, the magnitude of the increase was approximately the  
24      same in Cabell-Huntington as it was for the State of West  
25      Virginia, as well as the United States as a whole, correct?



1       **A.**     Correct.

2       **Q.**     So, across the DEA oxycodone quota and your analysis of  
3       total distributions of oxycodone and hydrocodone to the  
4       United States, West Virginia, and Cabell, and Huntington,  
5       the trend is the same, we see about a ten-fold increase; do  
6       you agree?

7       **A.**     Yes.

8       **Q.**     If we could pull up the demonstrative putting those  
9       side-by-side. So, that's why when you look at these charts  
10      together, you see the similar upward slope from 1997 to  
11      2010, correct?

12      **A.**     I'm sorry. What do you mean by "that's why"?

13      **Q.**     Because it's a similar factor, because it's the same  
14      factor of ten, we see a similar trend across all of these  
15      graphs, correct?

16      **A.**     I'm sorry. Yes. The -- the graphs all reflect a  
17      roughly ten-fold increase and so, visually, they appear to  
18      have the same slope.

19      **Q.**     Okay. Now, you created these -- the charts that you  
20      made, the ones that the orange and blue lines, using  
21      publicly available information from the ARCOS Retail Drug  
22      Summary Reports, correct?

23      **A.**     Yes.

24      **Q.**     And you accessed those reports on-line?

25      **A.**     Yes.

1 Q. Those Retail Drug Summary Reports reflect distributions  
2 to each state broken up by three digit zip code within that  
3 state year by year and quarter by quarter, right?

4 A. Correct.

5 Q. And you testified that those Retail Drug Summary  
6 Reports, which date back to 1997, have been publicly  
7 available for many years, potentially as early as 1998,  
8 correct?

9 A. Correct.

10 Q. So, individuals in Cabell and Huntington, law  
11 enforcement, public health officials, City Council members,  
12 Cabell County Commissioners, could have access to this  
13 publicly available information of quarterly shipments to the  
14 255 and 257 zip codes when it was posted, correct?

15 A. I don't know one way or another, but I don't know any  
16 reason why not.

17 Q. You don't know any reason why not, right?

18 A. Correct.

19 Q. You can take that back down. Thank you.

20 Many of the charts and graphs you testified about with  
21 Mr. Mougey reflect your calculation of how many prescription  
22 opioids were shipped to jurisdictions on a per capita basis;  
23 do you recall that?

24 A. Yes.

25 Q. So, let's discuss briefly the per capita calculations

1 that you -- that you did. For West Virginia, you calculated  
2 MMEs per capita for West Virginia and other states based on  
3 the publicly available Retail Drug Summary Reports with data  
4 going back to 1997, correct?

5 **A.** Correct.

6 **Q.** And you testified that the MMEs per capita was higher  
7 in West Virginia than it was in many other states, correct?

8 **A.** Correct.

9 **Q.** And that was true across the graph even in the early  
10 years as far back as the late '90s before prescriptions and  
11 distributions increased significantly across the country,  
12 right?

13 **A.** I don't have that early part of the graph visually in  
14 my mind right now, but that may be the case.

15 **Q.** Let's pull up Plaintiffs' 44711, Page 6, please. Do  
16 you agree that, as far back as the late '90s, the MMEs per  
17 capita was higher in West Virginia than it was in many other  
18 states in the country according to your chart?

19 **A.** Yes.

20 **Q.** And you understand, don't you, that a larger proportion  
21 of West Virginia's population suffers from conditions that  
22 cause pain, correct?

23 **A.** I'm not aware of that beyond just a general  
24 understanding that that's been asserted. I don't know that  
25 that's -- whether that's true or not.

1       **Q.**    Okay.  Let's talk about the per capita calculations you  
2       did specifically for Cabell and Huntington.  You did those  
3       calculations by dividing the total number of MMEs  
4       distributed to pharmacies in Cabell and Huntington by the  
5       population of Cabell and Huntington residents in the Census  
6       data you reviewed, correct?

7       **A.**    Correct.

8       **Q.**    And you testified that you're aware that Cabell County  
9       is a healthcare hub for the surrounding area, correct?

10      **A.**    Just generally.  Again, I understood that to be  
11      asserted and I saw some City of Huntington/Cabell County  
12      website claiming that.  I have no reason to doubt it.

13      **Q.**    Okay.  And are you aware from that, or otherwise, that  
14      people from the broader Huntington/Ashland Metro area come  
15      into Cabell County and Huntington for medical treatment?

16      **A.**    I've heard that said.  I don't know.  I don't have any  
17      personal knowledge of that.

18      **Q.**    Okay.  But you have no idea how many patients who lived  
19      outside of Cabell and Huntington got their prescriptions  
20      filled there, correct?

21      **A.**    Correct.  That type of data is available, but I don't  
22      have that data.

23      **Q.**    Okay.  Dr. McCann, you provided testimony about  
24      distributions to a number of pharmacies outside of Cabell  
25      and Huntington and I'm going to ask you a few more follow-up

1 questions. I know we've already discussed this a few times.

2 If we could please pull up P-43225, Page 7. I just  
3 want to look at the headers here with the pharmacies that  
4 you identified outside of Cabell and Huntington. This chart  
5 reflects data and analysis regarding oxycodone distributions  
6 to specific pharmacies in Cabell Huntington and as reflected  
7 on the chart here, 13 select pharmacies that are not located  
8 in Cabell or Huntington, correct?

9 **A.** Correct.

10 **Q.** And I think we looked at a few examples in your  
11 testimony earlier this morning, but several of the select  
12 pharmacies here are in the Eastern Panhandle of West  
13 Virginia, aren't they?

14 **A.** I'm sorry. I'm not really familiar with the counties  
15 in West Virginia.

16 **Q.** So, you're not aware that Hancock and Brooke Counties  
17 are in the Eastern Panhandle?

18 **A.** Correct.

19 **Q.** Are you aware that a couple of these pharmacies are in  
20 the Northern Panhandle?

21 **A.** No. Same answer.

22 **Q.** Okay. So, you're not aware that Berkeley County and  
23 Jefferson County are in the Northern Panhandle?

24 **A.** Right.

25 **Q.** Let's take a look at another page of your analysis.

1 THE COURT: You've got your panhandles backwards  
2 here.

3 MS. SALGADO: Oh, excuse me. I'm sorry. Thank  
4 you, Judge. Thank you.

5 THE WITNESS: Apparently, neither of us are.

6 BY MS. SALGADO:

7 Q. Let's take a look at the next page, please. Let's take  
8 a look at the headers for these outside of Cabell and  
9 Huntington pharmacies.

10 MS. SALGADO: Now, we don't have to worry about  
11 panhandles here for this one, I think, Your Honor.

12 BY MS. SALGADO:

13 Q. But I do know that three of those pharmacies are in  
14 Harrison County, correct?

15 A. Yes.

16 Q. And according to my math, that's about 170-mile drive  
17 from Huntington. Are you aware of that?

18 A. No.

19 Q. You also presented information and analysis regarding  
20 other pharmacies outside of Cabell and Huntington in what  
21 we've referred to as some of the pharmacy-specific packets,  
22 correct?

23 A. Yes.

24 Q. So, by my count, you presented data and analysis on 21  
25 pharmacies that are located outside of Cabell and Huntington

1 to which Cardinal Health shipped oxycodone or hydrocodone;  
2 does that sound correct?

3 **A.** Yes.

4 **Q.** And for all of the pharmacies you selected outside of  
5 Cabell and Huntington, you just analyzed Cardinal Health's  
6 shipments of oxycodone or hydrocodone, correct?

7 **A.** Well, it mischaracterizes my prior testimony a little  
8 bit. I didn't select these pharmacies, but the pharmacies  
9 that are listed on here are only on the oxycodone and  
10 hydrocodone versions of these charts. I don't have similar  
11 charts for other opioids.

12 **Q.** Okay. So, just to clarify for the pharmacies that  
13 counsel selected for you, you just analyzed Cardinal  
14 Health's shipments of oxycodone and hydrocodone in these  
15 charts, correct?

16 **A.** Correct.

17 **Q.** And --

18 THE COURT: Can I interrupt you for a minute?

19 MS. SALGADO: Please.

20 THE COURT: I'm unclear as to how -- what criteria  
21 was used to select the pharmacies here? I mean, obviously,  
22 there are a whole lot more pharmacies in the area than the  
23 ones that are depicted on the chart. How did these  
24 pharmacies on the chart make the chart?

25 THE WITNESS: Well, I can give you my general

1 understanding. We were given these, as what I understand to  
2 be illustrative choices by counsel of illustrative examples  
3 of bad behavior on the part of the distributors in Cabell  
4 County and the City of Huntington and in the counties  
5 outside. So, these are not all of the pharmacies and  
6 they're not intended to be selected randomly, I don't  
7 believe. I think that they're intended to show that there  
8 -- that the problems with the pharmacies that are identified  
9 in Cabell County and Huntington City are not unique to  
10 Cabell County and Huntington City, but part of a broader  
11 problem with the supervision of the distribution of drugs by  
12 these distributors. That's my general understanding.

13 I didn't choose these pharmacies, but that's -- that  
14 was what I understand the purpose of the exhibit is, to be  
15 used with other witnesses to provide testimony about the  
16 compliance and supervision issues.

17 MS. SALGADO: Your Honor, I'm just going to object  
18 to his characterization of bad behavior by distributors and  
19 his understanding as to how this is illustrative.

20 THE COURT: I'll overrule that. Just so I'll be  
21 clear, who selected the pharmacies that you included in the  
22 chart?

23 THE WITNESS: Counsel.

24 THE COURT: Counsel for the plaintiffs?

25 THE WITNESS: Correct.



1 THE COURT: Okay.

2 BY MS. SALGADO:

3 Q. As to these pharmacies outside of Cabell and Huntington  
4 that the distributors here serviced, you didn't look at the  
5 data on these distributors' distribution of non-controlled  
6 substances to those pharmacies, correct?

7 A. Correct.

8 Q. So, you don't know whether Cardinal Health also  
9 distributed above average volume of other medications,  
10 right?

11 A. Correct.

12 Q. And the same is true for ABDC?

13 A. Correct.

14 Q. And the same is true for McKesson?

15 A. Correct.

16 Q. And you, in fact, have no way of knowing the volume of  
17 other medications that Cardinal Health distributed to those  
18 pharmacies because Cardinal Health has not produced data on  
19 its distribution of non-controlled substances for pharmacies  
20 located outside of Cabell and Huntington, correct?

21 A. I'm not aware of that data being produced.

22 Q. Are you aware that for pharmacies and non-pharmacy  
23 customers in Cabell and Huntington the plaintiffs requested  
24 and Cardinal Health produced extensive data and numerous  
25 types of documents reflecting diligence regarding those

1 customers and their orders?

2 **A.** No, I'm not aware of that.

3 **Q.** And so, you're not aware of that as to  
4 AmerisourceBergen, as well?

5 **A.** Correct.

6 **Q.** And you're not aware of that as to McKesson?

7 **A.** Correct.

8 **Q.** Are you aware that plaintiffs did not request the same  
9 type of data and diligence documents regarding Cardinal  
10 Health's customers outside of Cabell and Huntington in this  
11 case?

12 **A.** I apologize. I may have -- I may have agreed to the  
13 sort of sequence of questions about the three distributors  
14 just now too quickly. Would you ask me that question again?  
15 It's re-playing in my mind and I'm not sure that I  
16 understood it the first time I answered.

17 **Q.** I'm happy to -- yeah, happy to make sure we're all on  
18 the same page here, so I will repeat the first question I  
19 asked, which was are you aware that for pharmacies and  
20 non-pharmacy customers in Cabell and Huntington the  
21 plaintiffs requested and Cardinal Health produced extensive  
22 data and numerous types of documents reflecting diligence  
23 regarding those customers and their orders?

24 **A.** Yes, I did answer too quickly. I know generally that  
25 the plaintiffs requested what I -- what I have heard

1 described as due diligence files. And so, if that is  
2 encompassing the data and numerous types of documents you  
3 reference in your question, then I know that generally those  
4 due diligence files were requested.

5 I think not just for Huntington City and Cabell County,  
6 but more broadly, and -- and I understand that those files  
7 have been produced, or at least some version of what I'm  
8 calling due diligence files were produced. I've received  
9 and seen some of them.

10 So, rather than answer as I did to that series of three  
11 questions, I probably should have given the opposite answer.  
12 I didn't understand the question the first time you asked  
13 it.

14 **Q.** That's okay. And due diligence files, as you call  
15 them, I think are -- or diligence files are part of what I'm  
16 talking about, but are you aware that plaintiffs requested  
17 and defendants produced many other types of documents and  
18 data reflecting diligence in this case?

19 **A.** I don't know anything beyond what I would describe as  
20 due diligence files.

21 **Q.** Are you aware, for example, that defendants ran in  
22 their e-mails of their anti-diversion personnel search terms  
23 specific to the pharmacies and customers in  
24 Cabell-Huntington so that they produced e-mail files that  
25 reflect discussions and diligence of those customers? Were

1       you aware of that?

2       **A.**    Yes, although I would have grouped down in what I  
3       thought of as due diligence files. I have some general  
4       understanding of that. I didn't review those files myself  
5       personally, but I have some general understanding of them  
6       being produced.

7       **Q.**    Are you aware also of the production of data beyond  
8       general distribution data? So, for example, data showing  
9       every time a threshold is changed or every time there is the  
10      exceedence (sic) of a threshold? Are you aware that that  
11      type of data was produced for defendants' customers in  
12      Cabell and Huntington?

13      **A.**    I have some general understanding. I don't recall  
14      reviewing those documents specifically in this case. I  
15      think I have reviewed similar documents in related cases. I  
16      just am not placing them in this case.

17      **Q.**    Okay. So, are you aware then that plaintiffs did not  
18      request the same type of data and diligence documents  
19      regarding distributors' customers outside of Cabell and  
20      Huntington in this case?

21      **A.**    I'm not aware one way or the other.

22      **Q.**    So, are you aware that Cardinal Health and other  
23      defendants did not produce the same type of data or  
24      documents reflecting diligence for customers outside of  
25      Cabell and Huntington in this case?

1       **A.**    No.  I'm not aware of that one way or the other.

2       **Q.**    Moving on to a different topic, Dr. McCann, let's cull  
3       up Plaintiffs' Exhibit 71128, please, and I'd like to focus  
4       in particular on the Cardinal Health pie chart here.

5             Dr. McCann, you testified about this chart -- I believe  
6       it was back on Monday, many moons ago, correct?

7       **A.**    Yes.

8       **Q.**    And you explained that this shows for each defendant  
9       which distribution center has shipped oxycodone and  
10      hydrocodone to Cabell-Huntington, right?

11      **A.**    Yes.

12      **Q.**    So, looking at the chart you made for Cardinal, this  
13      shows that 99.55% of the oxycodone and hydrocodone that  
14      Cardinal Health shipped into Cabell-Huntington was shipped  
15      from Cardinal Health's Wheeling, West Virginia distribution  
16      center.  Do you see that?

17      **A.**    Yes.

18      **Q.**    And it further shows which distribution centers account  
19      for the remaining .45% of oxycodone and hydrocodone that  
20      Cardinal shipped into Cabell-Huntington, right?

21      **A.**    Yes.

22      **Q.**    And you have identified in this chart every  
23      distribution center that appeared in the ARCOS data and  
24      Cardinal Health's produced data that shipped oxycodone or  
25      hydrocodone into Cabell-Huntington, right?  That's the

1 source of your data?

2 **A.** Correct.

3 **Q.** And so, as far as you're aware, there were no other  
4 Cardinal Health distributions other than those identified  
5 here that shipped any oxycodone or hydrocodone into  
6 Cabell-Huntington during this time frame, correct?

7 **A.** Correct, or at least these are the last Cardinal  
8 Distribution Center before the drug arrived in Cabell County  
9 and the City of Huntington. It could be that drug came from  
10 some distribution center other than Wheeling, West Virginia  
11 to Wheeling, West Virginia and then into the county, but  
12 this is -- all three of these pie charts are reflecting the  
13 last distribution center in the chain before the drugs  
14 entered Cabell County and City of Huntington.

15 **Q.** So, for example, a drug might be shipped from a  
16 national logistics center to a regional distribution center  
17 before being shipped to a customer, correct?

18 **A.** Correct.

19 **Q.** But you're not aware of any distributions from any  
20 other distribution centers directly other than what's  
21 reflected here, correct?

22 **A.** Correct.

23 **Q.** And you've provided the names and locations for some of  
24 the distribution centers identified. For example, Niagra  
25 Falls, New York appears at the bottom of the page, correct?

1       **A.**     Yes.

2       **Q.**     And for other of the distribution centers, you didn't  
3       provide the names or locations, but you did provide the  
4       unique DEA registration number, correct?

5       **A.**     Correct.

6       **Q.**     And each of those numbers corresponds to an  
7       identifiable distribution center, right?

8       **A.**     Correct.

9       **Q.**     And you may not have identified it, but it would be  
10      possible to be identified, correct?

11      **A.**     Correct. I'm not sure why the city and state is not on  
12      this for those two or three -- three that just have the DEA  
13      number.

14      **Q.**     Okay. So --

15               THE COURT: Excuse me. Dr. McCann, did the  
16      documentation that was furnished to you include the  
17      shipments to every pharmacy by these three defendants in  
18      West Virginia, for example?

19               THE WITNESS: Yes, Your Honor.

20               BY MS. SALGADO:

21      **Q.**     On this chart, if none of these -- assuming none of  
22      these DEA registration numbers corresponds to Cardinal  
23      Health's distribution center in Lakeland, Florida, then that  
24      means, according to your analysis, the Cardinal Health  
25      distribution center in Lakeland didn't ship any hydrocodone

1 or oxycodone to Cabell-Huntington, correct?

2 THE COURT: I'm sorry to interrupt again.

3 MS. SALGADO: That's okay.

4 THE COURT: I didn't ask the precise question I  
5 wanted you to answer. I asked you if the data included the  
6 shipments of every pharmacy. What I meant to ask was did it  
7 show the specific shipments to each specific pharmacy?

8 THE WITNESS: Oh, yes. The data is -- if you  
9 visualized it, it would be millions of lines of data, each  
10 line showing a specific shipment of a specific drug package  
11 from -- from a distributor and identifying which  
12 distribution facility it came from to a specific pharmacy.  
13 It will give the pharmacy's DEA number and the physical  
14 location of the pharmacy, as well as the name and some other  
15 information, but that's for every single shipment into  
16 Cabell County and the City of Huntington.

17 THE COURT: Okay. I'm sorry to interrupt you.

18 MS. SALGADO: That's okay. No problem.

19 BY MS. SALGADO:

20 **Q.** Just back on this, Dr. McCann, I believe you answered  
21 this, but making sure we're clear, that if none of the DEA  
22 registration numbers on this chart corresponds to Cardinal  
23 Health's Lakeland, Florida distribution center, then that  
24 means, according to your analysis, the Cardinal Health  
25 Lakeland Distribution Center did not ship any oxycodone or



1 hydrocodone into Cabell-Huntington, correct?

2 **A.** At least not directly into Cabell County and the City  
3 of Huntington.

4 **Q.** And the same is true for Cardinal Health's Auburn,  
5 Washington facility?

6 **A.** Yes. Same answer, not directly, at least into Cabell  
7 County and the City of Huntington.

8 **Q.** And the same is true for Cardinal Health's Swedesboro,  
9 New Jersey Distribution Center?

10 **A.** Correct.

11 **Q.** And the same is true for Cardinal Health's Stafford,  
12 Texas Distribution Center, correct?

13 **A.** Correct.

14 **Q.** Dr. McCann, you're not aware of any shipment by any  
15 distributor in this courtroom to a pharmacy that was not  
16 registered with the DEA and licensed by its state regulator,  
17 correct?

18 **A.** Correct.

19 **Q.** And of all the distributor shipments that you've  
20 analyzed, you're not aware of a single shipment shipped to a  
21 pharmacy without an order placed by that pharmacy for that  
22 shipment, correct?

23 **A.** Correct.

24 MS. SALGADO: That's all I have. Thank you so  
25 much.

1           Thanks, Your Honor.

2           THE WITNESS: Thank you.

3           THE COURT: Any redirect?

4           MR. MOUGEY: Thank you, Your Honor.

5           Good morning, Dr. McCann. Your Honor.

6           THE COURT: Good morning.

7           THE WITNESS: Good morning.

8                           **REDIRECT EXAMINATION**

9                           **BY MR. MOUGEY:**

10          **Q.** Dr. McCann, let's talk about the scope of what you were  
11 asked to do for Your Honor with processing and summarizing  
12 the data. Dr. McCann, were you asked to perform an analysis  
13 of the adequacy of the due diligence from each of these  
14 defendants into these pharmacies?

15          **A.** No.

16          **Q.** Were you asked to review the due diligence documents  
17 and I think what was just referred to as just an  
18 extraordinary amount of due diligence and apply that to the  
19 specific pharmacies?

20          **A.** No.

21          **Q.** Dr. McCann, were you asked to identify whether specific  
22 doctors in West Virginia were arrested or stripped of their  
23 medical licenses in relation to their prescriptions of  
24 opiates?

25          **A.** No.

1       **Q.**    Same question, Your Honor (sic) -- same question, Dr.  
2       McCann. Were you asked to analyze specific pharmacies and  
3       whether or not they were investigated and shut down by  
4       local, state or federal regulators?

5       **A.**    No.

6       **Q.**    Dr. McCann, were you asked to review whether or not  
7       each or any of these defendants, AmerisourceBergen, McKesson  
8       or Cardinal, had notice of issues relating to specific  
9       pharmacies and the volume of shipments into those pharmacies  
10      of opiates; specifically, oxycodone and hydrocodone?

11      **A.**    No.

12      **Q.**    Dr. McCann, were you asked to analyze the  
13      responsibilities of each of these pharmacies under the  
14      Controlled Substance Act; most specifically, 130174 orders  
15      of size, due diligence -- I'm sorry -- size, frequency or  
16      pattern and compare that to the due diligence in each of  
17      these defendants' files?

18               MR. MAHADY: Your Honor, I think this is outside  
19      the scope of the cross examination.

20               THE COURT: Well, I'm going to overrule it and let  
21      him answer. It may -- it -- it's close, but go ahead.

22               BY MR. MOUGEY:

23      **Q.**    Dr. McCann, were you asked to analyze whether any of  
24      these defendants had notice of whether or not residents of  
25      Cabell County, or any county for that matter, were traveling

1 distances to fill opiate prescriptions?

2 **A.** No.

3 **Q.** Dr. McCann, were you asked to perform any analysis  
4 whether or not any of these defendants had notice that West  
5 Virginia, most -- more specifically, Cabell County  
6 residents, were traveling from West Virginia to places as  
7 far away as Florida to fill prescriptions, opiate  
8 prescriptions?

9 **A.** No.

10 MR. MOUGEY: If we could please publish  
11 Plaintiffs' Exhibit 24013.

12 May I approach, Your Honor?

13 THE COURT: Yes.

14 THE WITNESS: Thank you.

15 BY MR. MOUGEY:

16 **Q.** Dr. McCann, Plaintiffs' Exhibit 24013 is a list of each  
17 of the counties in West Virginia and you were asked a series  
18 of questions, I believe, by each defendant about residents  
19 from counties surrounding Cabell into -- to fill  
20 prescriptions in Cabell County, correct, sir?

21 THE COURT: Mr. Schmidt?

22 MR. SCHMIDT: Your Honor, we'll object to this as  
23 outside the scope. I don't see how a new document listing a  
24 new ranking that we were given last night of different  
25 counties is inside the scope of any cross examination.

1 THE COURT: Where are you going with this, Mr.  
2 Mougey?

3 MR. MOUGEY: Pretty easy, Your Honor. First of  
4 all, on notice issue, this was provided back in 20 -- either  
5 '19 or '20. Had this for at least a year or two.

6 Secondly, Your Honor, as far as where I'm going, we've  
7 heard from each of the defendants that the surrounding  
8 counties' residents are coming to Cabell to fill opiate  
9 prescriptions and what I simply wanted to do, Your Honor, is  
10 point out the dosage units and the pills per cap in those  
11 surrounding counties that the defendants claim were coming  
12 to Cabell to fill prescriptions. Six or seven -- let's see.  
13 I think it's a total of one, two, three, four, five counties  
14 that are attached or connect to Cabell and then the counties  
15 that are within one county of Cabell.

16 MR. MAHADY: Your Honor, I have the additional  
17 objection that the witness has already testified very  
18 clearly that he knows nothing about these counties, where  
19 they are, what relation they have to Cabell County. And so,  
20 to now try and bootstrap this in through Mr. Mougey, I  
21 think, is inappropriate.

22 THE COURT: I'm going to sustain the objection.

23 MR. MOUGEY: Your Honor, may I respond just  
24 quickly? We've allowed each of these defendants to question  
25 extensively Dr. McCann about --

1 THE COURT: Well, I'm going to sustain the  
2 objection to this. I think he's basically said he doesn't  
3 know the answers to what you're asking to ask him. So, I'll  
4 sustain the objection.

5 MR. MOUGEY: Your Honor, just -- just hear me out.  
6 Your Honor, you can take judicial notice of where these  
7 counties are. I want to point out the counties surrounding  
8 Cabell. That's it, Your Honor. They've made extensive --

9 THE COURT: Objection's sustained.

10 BY MR. MOUGEY:

11 **Q.** Dr. McCann, in preparation for your testimony today,  
12 did you -- did you create an extensive packet on each of the  
13 pharmacies that you've covered?

14 **A.** Yes.

15 **Q.** What I've put in front of you, Dr. McCann, is  
16 Plaintiffs' Exhibit 44759-A and I'm not going to walk you  
17 through this entirely, but what I'd like you to do is flip  
18 through Plaintiffs' Exhibit 44759 and explain how these  
19 packages were created and, most specifically, did your  
20 office create computer code to generate a series of charts  
21 and graphs that you've included in these packages?

22 **A.** Yes. This is a set of standard charts and tables for  
23 each pharmacy. We create a package like this literally for  
24 every pharmacy in the country. A lot of what you and I  
25 spoke about on Monday and yesterday morning were a few

1 excerpted pages from this basic document, which is larger,  
2 and includes more information for each of the pharmacies.

3 **Q.** So, when -- earlier in the week when we were referring  
4 to pharmacy reports or pharmacy packages, you had created a  
5 package similar to this for almost every pharmacy that we've  
6 discussed this week, correct?

7 **A.** Correct.

8 **Q.** And Mr. Schmidt asked you questions about pulling out  
9 specific documents to get -- to provide to Your Honor,  
10 correct?

11 **A.** Yes.

12 **Q.** What you prepared, however, was a series of charts and  
13 graphs on each of the distributors for each of the  
14 pharmacies, correct?

15 **A.** Yes. Each of these packages are 40 or 50 pages and I  
16 think, given time and space constraints, only three or four  
17 pages were presented.

18 **Q.** And, Dr. McCann, if you would please turn to Page 20 --  
19 I'm sorry. Wrong page. Page 3. I apologize. Is Page 3  
20 one of the -- is an example of the type of chart that is in  
21 every single one of these pharmacy packets that we narrowed  
22 down at the request of the defendants?

23 MR. SCHMIDT: I'll object to that  
24 characterization, Your Honor. We didn't ask them to  
25 selectively pick out pages to show the Court from their

1 exhibit. We asked them to narrow the volume of their  
2 overall demonstratives.

3 MR. MOUGEY: That wasn't my question, Your Honor.  
4 I asked if we were requested to narrow it down.

5 MR. SCHMIDT: I think that's an unfair  
6 construction for the witness about discussions that the  
7 witness wouldn't know about between counsel and us.

8 THE COURT: I'm going to allow him to answer it.  
9 Go ahead if you can answer it, Dr. McCann. Go ahead.

10 THE WITNESS: I'm sorry. Could you ask it again,  
11 please, Mr. Mougey?

12 BY MR. MOUGEY:

13 **Q.** Yes, sir. Page 2 that's in front of you, did -- is  
14 this sample that identifies each and every distributor that  
15 sent shipments into Sav-Rite, was that a standard page in  
16 each of your pharmacy packets?

17 **A.** Yes. Every single package shows every single  
18 distributor of oxycodone and hydrocodone each year to each  
19 pharmacy.

20 **Q.** So, for example, the McKesson shipment in 2006 to  
21 Sav-Rite of hydrocodone of 2.2 million pills is identified  
22 in each of these packets?

23 **A.** Or the analogous number, yes, that's correct.

24 **Q.** And also, Miami-Luken of 342,000 pills in 2006, that  
25 type of chart and graph is in each one of these so Your



1 Honor could look and see which of the distributors supplied  
2 each and every one of the defendants -- yes, each around  
3 everyone of the pharmacies?

4 **A.** Correct.

5 **Q.** Dr. McCann, just looking quickly at 2007, McKesson,  
6 2.6 million dosage units of hydrocodone in 2007, correct?

7 **A.** Correct.

8 **Q.** So, in two successive years, 2.2 million and  
9 2.6 million from McKesson into Sav-Rite pharmacy in Kermit,  
10 West Virginia, correct?

11 **A.** Correct.

12 **Q.** Total of 4.8 million dosage units into Kermit, correct,  
13 sir?

14 **A.** Correct.

15 **Q.** And, Dr. McCann, proceeding quickly so Your Honor can  
16 get a feel for what's in each of these pharmacy packets,  
17 please turn to Page 9. Each one of these pharmacy packets  
18 identifies the distribution from McKesson and others,  
19 correct, sir?

20 **A.** Correct.

21 **Q.** And if you turn to Page 14 --

22 **A.** Yes.

23 **Q.** Each and every one of these pharmacy packets contains a  
24 table showing the monthly distribution to those pharmacies  
25 and the monthly changes, correct, sir?

1       **A.**     Correct.

2               THE COURT:   And you did a packet for each one of  
3     the pharmacies that was selected for you by counsel for the  
4     plaintiffs; is that right?

5               THE WITNESS:  More broadly than that, a packet for  
6     every pharmacy, I think, literally in the country.  There's  
7     -- there's hundreds of thousands of these.  And so, that  
8     includes every pharmacy in West Virginia and every pharmacy  
9     that's selected for that exhibit that we looked at.

10              THE COURT:  Well, you didn't do a packet for every  
11     pharmacy in America, did you?

12              THE WITNESS:  We did.

13              THE COURT:  You did?

14              THE WITNESS:  We did.

15              MR. MOUGEY:  Yes, sir.  We're going to get into  
16     that.

17              BY MR. MOUGEY:

18       **Q.**     So, Dr. McCann, each --

19              MS. SALGADO:  Your Honor, just to note, I don't  
20     believe that those pharmacy packets have been provided in  
21     this case for every pharmacy in the country; is that right?

22              BY MR. MOUGEY:

23       **Q.**     Dr. McCann, where are these pharmacy charts and reports  
24     that contain a -- most or a lot of information that are in  
25     these packets?  Where can anyone find those?

1       **A.**     They're on my website, Your Honor.

2       **Q.**     And how long have they been on your website?

3       **A.**     Over a year.

4       **Q.**     They don't contain all of the information in these  
5       packets, but they contain charts and reports on each  
6       pharmacy?

7               THE COURT:   Just a minute.

8               MS. SALGADO:  Right.  I just was noting that --  
9       the characterization that there are these packets provided  
10      for every pharmacy in America.  I don't believe that we have  
11      had access to those; is that correct?

12              BY MR. MOUGEY:

13      **Q.**     Dr. McCann, who can --

14              MR. SCHMIDT:  Your Honor, can I make a separate --  
15      or if you're rephrasing, then that moots my objection.

16              THE COURT:   Go ahead.

17              MR. SCHMIDT:  I was just going to say, I haven't  
18      been objecting to the leading that's been going on for the  
19      past five minutes, but I think we're now getting testimony,  
20      so I will object.

21              THE COURT:   Don't lead him, Mr. Mougey.

22              MR. MOUGEY:  Yes, sir.

23              BY MR. MOUGEY:

24      **Q.**     Dr. McCann, the pharmacy reports that are on your  
25      website, how can anyone access those?

1     **A.**     Well, on my firm's website, there's a tab for opioid  
2     data. It was put up there to make the raw and processed  
3     ARCOS data available and to make reports available on every  
4     -- every state, every county, every pharmacy, and the only  
5     -- I think the main difference between those reports and  
6     these reports is that the reports that are on our website  
7     have to be based solely on the ARCOS data, the 2006 to 2014  
8     time period, where the data has been publicly -- made  
9     publicly available by Judge Polster. These exhibits that  
10    we're looking at, these pharmacy reports, include the  
11    defendant transaction data before and after, but other than  
12    that, I think they're the same.

13    **Q.**     Dr. McCann, I hand you what we've marked as Plaintiffs'  
14    Exhibit 44758. Dr. McCann, this is a SafeScript Report. Is  
15    this laid out similar to the exhibit that we just went  
16    through?

17    **A.**     Yes.

18    **Q.**     And does this report contain charts and graphs  
19    identifying each and every distribution to each of the  
20    pharmacies? I mean to SafeScript pharmacy?

21            THE COURT: Mr. Mahady?

22            MR. MAHADY: Your Honor, I don't understand the  
23    point of this. The plaintiffs have spent plenty of time  
24    going through the charts they selected to use for SafeScript  
25    Pharmacy. We're now on redirect and they're trying to use a

1 much broader set. I simply don't understand the purpose.  
2 It just seems cumulative and unnecessary at this point.

3 MR. MOUGEY: I'll explain the purpose.

4 THE COURT: Okay, please.

5 MR. MOUGEY: Your Honor, Mr. Schmidt spent about  
6 45 minutes questioning the witness that the charts were  
7 cherry-picked and selected. What we're trying to  
8 demonstrate, Your Honor, just to give you two examples,  
9 that's all I'm trying to go through of what these pharmacy  
10 packets looked like and what we tried to introduce over Mr.  
11 Mahady's objection and Mr. Schmidt's objection.

12 I just wanted you to get -- see two packets so you  
13 could see what we put together, Your Honor. That's it.

14 And, Your Honor, one of the issues that concerns me  
15 going forward is exactly what happened yesterday with Mr.  
16 Schmidt. The questioning of Dr. McCann, you didn't include  
17 this, you didn't include this, and you didn't include this.

18 And, Your Honor, you got a preview of -- I -- the very  
19 first day I appeared in front of you, Your Honor, I  
20 predicted that this was going to be a problem, is that we  
21 wanted to put these pharmacy packets in as tools for the  
22 Court to use and the parties to use to know exactly what was  
23 distributed.

24 The defendants spent a significant amount of time over  
25 the last two days arguing about what wasn't included when,

1 in fact, Judge, we tried to include it and we tried to  
2 include extensive tools. I just wanted you to see what was  
3 available so, going forward to today, we have a pharmacy  
4 packet for 25 different pharmacies in CT2 if the Court needs  
5 them. That's all I'm trying to do, Judge, is show you what  
6 we have and what we've created. That's it.

7 MR. MAHADY: Your Honor --

8 THE COURT: Yeah, but you've picked -- you've  
9 selectively picked pharmacies for him to use. I mean, I  
10 don't understand your point.

11 MR. MOUGEY: Well, my -- I'm sorry, Judge. I must  
12 be doing a terrible job of explaining it.

13 THE COURT: Well, I may not --

14 MR. MOUGEY: If I may take another crack at it and  
15 I appreciate your patience, just so we understand.

16 The CC2 packets, the Cabell County packets, Your Honor,  
17 are approximately 20, 25 pharmacies from Cabell County. All  
18 right. We've shown each one of those. Each one of these  
19 packets contain a list and they contain detailed information  
20 about where the pills came from, from any and every  
21 distributor.

22 What I was worried about not getting these in is  
23 exactly what happened with Mr. Schmidt's questioning of Dr.  
24 McCann of what we didn't put in. So, on one hand, the  
25 defendants are objecting to the volume of us trying to put a

1 complete record in and then -- and which you agreed, told me  
2 to narrow down. And then, on the other hand, another  
3 defendant's questioning about why things weren't included.

4 And all I'm simply trying to point out, Your Honor, is  
5 we tried to include them and we tried to include and  
6 identify every single distributor distribution to every  
7 pharmacy, especially for the Cabell County pharmacies.  
8 That's it, Your Honor.

9 THE COURT: Well, if I remember correctly, you  
10 tried to put in the entire universe of the ARCOS data, which  
11 is unintelligible, until Dr. McCann used his computer magic  
12 on it.

13 MR. MOUGEY: Yes, sir.

14 THE COURT: And pulled out the parts that were --  
15 that we needed.

16 MR. MOUGEY: Yes, sir. And that's exactly right.  
17 And you put it perfectly.

18 So, we had the ARCOS data in total, which the  
19 defendants objected, and you -- and you pointed out, Judge,  
20 it was cumulative. And then, we attempted to put in these  
21 packets for the pharmacies in Cabell County and the  
22 defendants objected that they were voluminous.

23 So, all I'm trying to point out, Your Honor, is these  
24 tools are available to the Court because what I am worried  
25 about is that when Dr. McCann leaves the stand, that the

1 type of questioning that Mr. Schmidt did yesterday about  
2 what we didn't include is right in these packets sitting in  
3 the jury room for every pharmacy, but they've objected to  
4 volume.

5 The tools are available. We've identified detailed  
6 information in these packages, Your Honor. That's all I'm  
7 trying to demonstrate.

8 MR. MAHADY: Your Honor, if I may, this Court has  
9 to consider evidence, not tools hand-picked by the  
10 plaintiffs' lawyers. And I know we are going to address  
11 this issue of what constitutes a 1006 summary, but we  
12 continue to maintain that these are not 1006. They are not  
13 evidence.

14 So, while it may help facilitate the plaintiffs' case  
15 here to give the Court essentially an expert's work product,  
16 it's not evidence and, if they haven't established that, the  
17 Court should not consider it. And we can address that at  
18 the appropriate time, but we strongly object to the use of  
19 tools to help the Court as we go forward.

20 THE COURT: Okay. Mr. Schmidt, do you want to say  
21 something?

22 MR. SCHMIDT: Yes, briefly, just to respond to Mr.  
23 Mougey's comments, which are not at all what I was trying to  
24 communicate with my cross examination.

25 With the Strosnider Sav-Rite pharmacy, there was a



1 three-page document that was shown to Dr. McCann. They read  
2 global numbers without ever making clear that most of those  
3 numbers did not apply to McKesson. They then only showed  
4 data that applied to McKesson.

5 We did not ask them to cull out of this document that  
6 they showed the court direct examination data regarding  
7 other distributors. When I showed Dr. McCann the data he  
8 had provided regarding other distributors, I did my level  
9 best to make it clear that we had been provided with that  
10 data. We didn't make that data up, but it came from Dr.  
11 McCann from this very packet that Mr. Mougey is now trying  
12 to introduce into evidence.

13 So, the point of the cross examination was not to  
14 suggest that he had not done these broader analyses. The  
15 point of the cross examination was that, in the direct  
16 presentation, the culling down of those analyses to three  
17 pages that make no express mention of the other  
18 distributors, but that included reading their numbers into  
19 the record, that we needed to make a complete record on  
20 that.

21 MR. MOUGEY: Your Honor, that's -- that's not  
22 accurate.

23 THE COURT: Well, I'm going to sustain the  
24 objection, Mr. Mougey, and you can move on.

25 MR. MOUGEY: Your Honor, we move to admit each of

1 the pharmacy packets that we have tried to admit now three  
2 different times that we've been -- we've been, by the  
3 objections of the defendants, have been told to narrow those  
4 down to a handful of pages. Mr. Mahady just -- just argued  
5 to the Court that those -- these are tools, not evidence.

6 Your Honor, we move every single one of these packets  
7 to the place where we started and the Court can make -- even  
8 conditionally, Your Honor, the Court can make decisions  
9 moving forward about what evidence is in and not in, but it  
10 does give the Court the flexibility to reference these so we  
11 do not have to have discussions like we're having right now  
12 with Mr. Schmidt about what was in and what wasn't because,  
13 Your Honor, I do believe I showed a chart immediately  
14 thereafter that identified the specific McKesson shipments.

15 And this is all unnecessary, Your Honor. This is  
16 classic 1006 summary evidence, classic, that the -- that the  
17 underlying database is so voluminous and is impractical to  
18 use. Therefore, we've turned it into charts and packets and  
19 summaries for the Court to use, which is exactly what 1006  
20 is designed to do.

21 So, I believe, Your Honor, what I think would be a  
22 smart approach to this, is Mr. Mahady suggested this just a  
23 few days ago, is that -- it seems like two weeks ago --  
24 which would be for each of the parties to submit some briefs  
25 based on where we are and you allow the defendants to cross.

1 Let's get this put in an organized fashion for Your Honor  
2 with the -- with some short briefings for you to be able to  
3 review and make a decision about whether or not this is  
4 appropriate 1006 because we believe it squarely falls, is  
5 exactly what 1006 is designed to do. Otherwise, Your Honor,  
6 how in the world are we going to get the database in as you  
7 just said?

8 MR. MAHADY: Your Honor, I would like to respond  
9 on 1006. I think we're probably at the appropriate time to  
10 do so. Do you mind if I go to the podium and address it --

11 MR. MOUGEY: No. I --

12 MR. MAHADY: -- or do you want to hold of on this?

13 THE COURT: I think -- let me get one other oar in  
14 the water here.

15 MS. SALGADO: No. I'll let Mr. Mahady go first,  
16 but I appreciate it, Your Honor.

17 MR. MAHADY: Your Honor, to address one point if  
18 we're not going to argue this right now, we do not think  
19 that these should be conditionally admitted and, while we  
20 are happy to brief the issue, we do not think until that  
21 briefing has been submitted and decided that these 1006  
22 summaries, purported evidence, should be used with witnesses  
23 on cross examination. So --

24 MR. MOUGEY: Exactly my point, Your Honor.

25 Chicken -- chicken or the egg, which we've been trying to

1 get these admitted for three months and get this issue  
2 framed up for Your Honor.

3 THE COURT: I -- I want this issue briefed whether  
4 this is appropriate 1006 and whether it comes in as evidence  
5 or whether it's just demonstrative under 1006. I think you  
6 ought to brief it and let me consider it further on paper  
7 because I think it's a crucial issue in the case and I need  
8 all the help on the law I can get. So --

9 MR. MOUGEY: That -- that sounds perfect, Your  
10 Honor, and I think we just need to figure out what the  
11 timetable is so we can get it in front of Your Honor and I  
12 think Mr. Mahady --

13 THE COURT: Okay. How much time do you need?

14 MR. MAHADY: Today is Wednesday, Your Honor. We  
15 need to have the transcripts, obviously, which I believe we  
16 do. We -- I -- I'm not writing the briefs, so I've got to  
17 be careful here I don't get in trouble back at the ranch.

18 MR. MOUGEY: I think I heard Mr. Mahady say end of  
19 the day, he was ready.

20 MR. MAHADY: If you'd want to call ABC witnesses,  
21 I'd commit to that. But why don't we say end of the day  
22 Friday?

23 THE COURT: Well, that's okay with me.

24 MR. MOUGEY: I'm okay with that, but you heard Mr.  
25 Mahady say that they're going to object. So, when Mr.

1 Farrell is going to try to use the numbers that we've just  
2 put in with the next series of witnesses from ABC, that  
3 you're going to hear an objection that they're not admitted,  
4 Your Honor. So, that's kind of what I meant.

5 The -- I think I said the chicken before the cart,  
6 but I think I mixed my examples there. The horse before the  
7 cart.

8 MR. MAHADY: Your Honor --

9 THE COURT: Go ahead.

10 MR. MAHADY: I'm sorry. Go ahead, Your Honor.

11 THE COURT: I can hear the testimony and then  
12 decide later. We don't have to --

13 MR. MOUGEY: Exactly.

14 THE COURT: -- worry about confusing a jury. We  
15 only have to worry about confusing me. And so, I think the  
16 thing to do is go ahead with the evidence and the testimony  
17 and see where it leads and then consider the briefs and I  
18 can go back and sort it out after the fact.

19 MR. MOUGEY: That sounds like a plan, Your Honor.

20 MR. MAHADY: Your Honor, appreciating Your Honor's  
21 guidance there, the one thing we would request is that they  
22 cannot show the witness, an AmerisourceBergen witness or a  
23 Cardinal, a McKesson witness, a chart that they didn't use  
24 with Dr. McCann.

25 What Mr. Mougey is saying is we decided which ones we

1 wanted to show him yesterday when we were questioning, but  
2 here's the 50-page packet which has all the background  
3 stuff. That has not come in at all.

4 So, to the extent they're going to show our witnesses  
5 anything, we think it should be -- it should be absolutely  
6 limited to what Dr. McCann has testified to.

7 MR. MOUGEY: Just quickly. What I was trying to  
8 demonstrate this morning, Your Honor, is the kind of  
9 catch-22 we're in with the objection over volume and then  
10 pointing out that there's specific data points that are not  
11 in when we've tried to get them in, Your Honor. So, the  
12 defendants can't have it both ways with, say, it's too much  
13 volume when I've told Your Honor there's 500 million lines  
14 and, if you printed it out, there were 27,000 banker's  
15 boxes.

16 I've got these pharmacies packets to one -- we're  
17 arguing about one banker's box worth of pharmacy packets to  
18 get into evidence. All I'm asking, Your Honor, let's get  
19 the 1006 briefed. Let's hold this decision because, if the  
20 defendants go -- and the witnesses go a different route than  
21 the charts that are in, I've said this the other day, Your  
22 Honor, my concern was, is that the packets weren't into  
23 evidence.

24 So, Judge, I think we don't have to make this decision  
25 now. Let's not argue it hypothetically. We have the

1 specific charts that I have into evidence. Let's get this  
2 briefed and have Your Honor make a ruling and a decision  
3 and, if issues arise, I just -- to steal Mr. Mahady's  
4 phrase, I've put a pin in it and let's decide it as it  
5 arises because I don't think you need to make this decision  
6 right now before the 1006s, Your Honor.

7 All I wanted you to see is the types of packets that I  
8 had prepared and that we have -- we tried to get into  
9 evidence over their objection. That was it, Your Honor.

10 MR. MAHADY: Your Honor, I think we have a problem  
11 here because I think what the plaintiffs are trying to do is  
12 saying let's brief it, let's let it, you know, sit out there  
13 to the extent it needs to sit out there and, by the time we  
14 get a ruling, all of the company witnesses will have already  
15 testified and, at that point, it's tough to undo if the  
16 Court rules that these 1006 summaries that they call them  
17 are not evidence.

18 We can brief this on an accelerated basis. I think  
19 I've committed to that. If we have to bump it up a day to  
20 tomorrow, we'll have it briefed by tomorrow.

21 But we would like a ruling on this. We are not  
22 comfortable with a conditional ruling letting all of this  
23 come in with our witnesses and then finding out after the  
24 fact that they are, in fact, not evidence. So --

25 MR. MOUGEY: Which is --

1           MR. MAHADY: We certainly defer to Your Honor on  
2 his schedule and how he wants to decide these things, but I  
3 am concerned that this could be somewhat of a drawn out  
4 process in briefing and it's going to be tough to undo.

5           MR. MOUGEY: Your Honor, which is exactly why  
6 we've been trying to address this for three months, to avoid  
7 taking trial time to go back and forth on this.

8           I agree with Mr. Mahady. We are beyond time to get  
9 this decided. And I'll avoid any color of what I believe  
10 cross did or didn't reveal at this point but, Your Honor,  
11 let's get it briefed, let's get it in.

12           And you made the best point so far out of either of us  
13 is, the gatekeeper function of having a jury here is not an  
14 issue, and I don't think anybody in this courtroom is  
15 concerned with your ability to make decisions and give the  
16 weight the -- the evidence the appropriate weight it  
17 deserves, but this is exactly why we tried to address this  
18 issue prior to trial, and I think what's playing out right  
19 now is exactly what we've been saying for what feels like  
20 months.

21           MR. MAHADY: Your Honor, if I could just make two  
22 more points. This issue has been playing out for months.  
23 The reason this issue has been playing out for months was  
24 because these purported 1006 summaries are layered with  
25 analysis and relevancy decisions made by the plaintiffs and



1 their expert.

2 If these were true 1006 summaries, we wouldn't be  
3 fighting about it. We probably would have come into court  
4 with some stipulation that they can come in. But this is a  
5 problem of the plaintiffs' own making. The fact that they  
6 are not able to get these into evidence easily should not be  
7 -- it should not be implied that we caused this.

8 The other issue is that Mr. Mougey references that this  
9 is a bench trial, and that's absolutely true, and we  
10 certainly appreciate that Your Honor can make decisions as  
11 to weight and everything.

12 But in addition to being a bench trial, this is the  
13 first trial in the federal MDL. Decisions that are made  
14 here on these critical issues will have a ripple effect into  
15 other trials; not just other federal trials, but other state  
16 court trials, including trials where the same plaintiff  
17 lawyers and Dr. McCann are a part of it.

18 And so, we are a little concerned about the suggestion  
19 that this is just a bench trial. We can be a little more  
20 relaxed, to the extent that is what they're suggesting. I'm  
21 not saying it is.

22 But this is a critical issue. There's pretty strong  
23 case law on this from the Fourth Circuit. And that's why we  
24 feel so strongly here. And we're going to brief it and  
25 we'll have it to you by the end of the day tomorrow, Your

1 Honor.

2 THE COURT: Can you brief it and have it to me by  
3 the end of the day tomorrow, as well?

4 MR. MAJESTRO: Yes, Your Honor

5 MR. MOUGEY: Yes, Your Honor.

6 THE COURT: Okay. Does that get around the  
7 problem of calling witnesses without having this resolved,  
8 Mr. Mahady?

9 MR. MAHADY: Your Honor, our position is that they  
10 should not be using expert demonstratives with our witnesses  
11 until the Court has ruled on it.

12 MR. MOUGEY: Your Honor, many of these charts the  
13 defendants have had for a year and if they had issues of --

14 THE COURT: Well, okay. I've got that point, that  
15 they've had it for a year, and that's beside the point now,  
16 as far as I'm concerned.

17 MR. MOUGEY: I agree.

18 MR. MAHADY: Your Honor -- I'm sorry.

19 THE COURT: Yes, sir?

20 MR. NICHOLAS: Well, since I'm -- it's Bob  
21 Nicholas. Since I'm going to be handling the first witness  
22 that's called for ABDC this afternoon, or later this  
23 morning, my suggestion is that the witness -- that  
24 plaintiffs not be permitted to show these charts to the  
25 witness.

1           They can ask questions, you know, that -- they can ask  
2           their questions. I mean, whatever is in the charts that  
3           they want to ask, they can just ask the question. I don't  
4           think this is the time to start displaying these charts.

5           THE COURT: Well, that's exactly right, isn't it,  
6           Mr. Mougey? You can ask the questions; don't show them the  
7           chart.

8           MR. MAHADY: And, Your Honor, I will note that's  
9           the same thing that we were held to yesterday with the  
10          expert report.

11          THE COURT: Right.

12          Mr. Farrell?

13          MR. FARRELL: The first witness we intend to call  
14          is the Senior Vice President of Corporate Security and  
15          Regulatory Affairs, Chris Zimmerman. It has been our  
16          intention for three, four years now to be able to take the  
17          amount of pills that were sold by his company under his  
18          watch to SafeScript and ask him how is it possible this  
19          occurred if you were maintaining effectively --

20          THE COURT: Well, you don't need the exhibit to  
21          ask him that, Mr. Farrell.

22          MR. FARRELL: So, what we've done is we've taken  
23          the data and we've asked you to admit the raw data and you  
24          said it was cumulative. What we have done after that is we  
25          have attempted to take that data and put it into components

1 and the defendants have objected and you've yet to rule.

2 The reason it's important is this, is that in certain  
3 months, you will see that -- I'll give you an example. In  
4 July of 2007, with SafeScript, an event happened. Then, the  
5 month after that, they sold more pills. The month after  
6 that, they sold less pills. The months after that, they  
7 sold three times the pills.

8 One of the metrics required we argue under law is to  
9 look in change of patterns. This packet, P-44758, doesn't  
10 contain the 40,000 lines of individual transactions. It  
11 summarizes it into months, into compartments.

12 As you were asking Mr. -- Dr. McCann earlier, we can  
13 literally pull up on the screen, and we will today, if need  
14 be, the actual transactions in a spreadsheet, 40,000 of  
15 them, and be able to scroll through them to ask this witness  
16 what happened between Point A and Point B.

17 So, it's one or the other. We're either going to need  
18 to go through the transaction data line by line by line to  
19 illustrate a systemic and nationwide failure to maintain  
20 effective control or we can put in the packets that convert  
21 the Excel spreadsheet into charts. We're asking you for one  
22 or the other. We have both.

23 And, importantly, Judge, respectfully, Dr. McCann has  
24 laid the foundation for this to be admitted into the record  
25 not as anything else other than actual evidence. He's laid

1 the foundation. Authenticity is stipulated. He's testified  
2 that -- now you can apply weight to it as you deem fit, but  
3 it is evidence of what they did, when they did it, and where  
4 they did it.

5 MR. MAHADY: Your Honor, if I may respond. I  
6 think yesterday actually illustrated the concern with just  
7 showing a witness a chart. We saw on McCloud Family  
8 Pharmacy that the chart that the plaintiffs prepared for one  
9 month where there was a large spike overstated our  
10 distribution by, as Mr. McCann testified, 20-some percent.

11 If that chart was shown to one of our witnesses, they  
12 would have no idea that those 15,200 pills actually were  
13 returned to AmerisourceBergen, were never on the shelves for  
14 the pharmacy, and that's the concern.

15 Now, instead, if the plaintiffs showed them the  
16 transactional data, Mr. Zimmerman would look at it and he  
17 would say, okay, what I see here are five separate  
18 transactions showing negative numbers, which shows that it's  
19 not the 57,000 number you're telling me. It's actually 42.

20 So, it gets at the inherent problem with the charts.  
21 The charts are based off of relevancy determinations made by  
22 the plaintiffs. It does not accurately reflect what our  
23 actual distribution was. So, that's the problem we have  
24 with just showing them charts.

25 MR. MOUGEY: Your Honor, when Mr. Mahady yesterday

1 brought up the 15,200, I typed that into my calculator using  
2 -- turning it into a percentage. It's .000003 of the pills,  
3 and I might have a couple 0s missing, into McCloud Pharmacy,  
4 Your Honor.

5 So, one issue, as far as the reliability, Dr. McCann  
6 has testified that 99.9% of the transactions match. They've  
7 done nothing to undermine that reliability with that  
8 example, number -- number one.

9 Number two, there has been no relevancy decisions about  
10 tracking these shipments into pharmacy by pharmacy. The  
11 retail and chain pharmacies have been identified for Your  
12 Honor. The hospitals have been removed. And the shipments  
13 per distributor are included. We've put all of that into  
14 the record.

15 And there are additional -- as I have just shown with  
16 the SafeScript chart, there's no relevancy determination  
17 and, after hearing all of this cross that they've asked for  
18 over the last day, you've heard nothing besides weight, Your  
19 Honor.

20 THE COURT: Well, let me -- let me try to cut to  
21 the chase here. The issue is whether the documentation here  
22 is admissible into evidence as the summary chart of -- under  
23 -- I can't remember the rule, but as a summary chart. The  
24 information has been shown to the witness and so, it's -- in  
25 its current form, it's a demonstrative that hasn't been

1 admitted into evidence, but it is a piece of paper that has  
2 illustrated his testimony as a demonstrative. So, it's  
3 already before the Court.

4 The issue is whether I'm going to admit it as evidence  
5 or leave it in its current form as a demonstrative, which  
6 will assist the trier of fact and it will not be admitted  
7 into evidence. Since it's already been displayed as a  
8 demonstrative, why can't the plaintiffs use it to testify --  
9 to -- to question the witness even if it's not admissible?

10 MR. MAHADY: One -- go ahead.

11 MR. NICHOLAS: Well, I think the answer is because  
12 the witness doesn't have the benefit -- the witness is  
13 seeing the chart for the first time. The witness will not  
14 have the benefit of the challenges that have been made to  
15 its accuracy and the limitations that, you know, could  
16 result in the witness answering a question about the  
17 document that assumes things that don't turn out to be  
18 correct and the witness will have no way of knowing that.

19 I don't -- I'm having trouble understanding why -- this  
20 all sounds very complicated, but it seems to me that if Mr.  
21 Farrell, who I assume is going to question the next witness,  
22 I don't know why he can't formulate a question that gets at  
23 whatever information he wants to try to elicit to see if the  
24 witness knows about without the benefit of the piece of  
25 paper.

1 THE COURT: Yeah. What about that, Mr. Farrell?

2 MR. FARRELL: Great point. So, when -- if I may?  
3 When I stand up to ask Mr. Zimmerman, please turn to Page --  
4 to Page 16 and look at this, they're going to stand up and  
5 say Page 16 isn't in the record.

6 When I stand up and say please go to Line 43,728 and  
7 explain why you shipped 50,000 pills on August 2nd, they're  
8 going to object and say it's not in the record.

9 It's the chicken or the egg. This is the box that we  
10 are being placed in.

11 MR. NICHOLAS: I feel like -- I'm sorry. I feel  
12 like we're --

13 THE COURT: Well, you're suggesting that he can --  
14 he can ask the question without the use of the paper, right?

15 MR. NICHOLAS: Yes.

16 MR. FARRELL: So, I can go through each of the  
17 transactions from the dataset that you have not allowed to  
18 be entered into the record, I can pull up this, read it to  
19 him, and ask him if he can confirm it, and he's going to say  
20 yes or no? I mean, he's going to say I haven't seen the  
21 data.

22 MR. NICHOLAS: Well, I don't know what he'll say  
23 about the particular data that he's going to be shown. He  
24 may well say I haven't seen this or I haven't seen that.

25 But one other point is that we have produced



1 transactional data in this case. If they want to use what  
2 we've produced, that's a different story. It seems to me  
3 they can show him that.

4 What we're talking about now is something different.  
5 It's something created by an expert that he has not -- he  
6 doesn't know anything about. He hasn't read their reports.  
7 He has -- you know, he hasn't seen whatever he is going to  
8 be shown before.

9 He's going to be given a cold -- you know, what we  
10 would argue is pejorative, or biased possibly, or unreliable  
11 summary that -- that's based on things, you know, decisions  
12 that were made by counsel. We've already heard that counsel  
13 was cherry-picking -- I'll withdraw the word.

14 THE COURT: Okay. Okay. Here's what I'm going to  
15 do. I'm going to pull the plug on this. I need advice of  
16 counsel, so I need to confer with my law clerks.

17 I have another matter to take up at noon. Let's come  
18 back. Let's pull the plug on it now and come back at 1:30  
19 and we'll see where we are, okay?

20 MR. HESTER: And, Your Honor, should we be aiming  
21 to submit briefs by tomorrow on this issue?

22 THE COURT: Yes. I want the issue briefed. I  
23 would like to have the issue briefed.

24 MR. MAHADY: Thank you, Your Honor.

25 MR. NICHOLAS: Thank you, Your Honor.

1 (Recess taken)

2 THE COURT: Dr. McCann? Dr. McCann?

3 MR. MOUGEY: He's outside, Judge. We'll get him.

4 Sorry. I wasn't sure.

5 THE COURT: We might be a little early here.

6 All right. Mr. Mougey, you may proceed.

7 MR. MOUGEY: Thank you, Your Honor.

8 BY MR. MOUGEY:

9 Q. Dr. McCann, before the lunch break, you had responded  
10 to a question from the Court about the scale or how large of  
11 the summary charts and graphs and market share you've  
12 produced around the country.

13 A. Yes.

14 Q. Would you please explain to the Court how you were able  
15 to create those charts and graphs for every county in the  
16 country?

17 A. Sure. So, once the data was defined to be -- for the  
18 charts and tables that we've been talking about these three  
19 days to be shipments from manufacturers to distributors and  
20 then shipments from manufacturers and distributors to  
21 dispensers --

22 THE COURT: Mr. Mougey, I didn't mean to open  
23 another line of questioning.

24 MR. MOUGEY: It was actually in response to Mr.  
25 Schmidt and I promise it will be just a second, Judge.

1           THE WITNESS: Once that data was prepared, sub-set  
2     it and prepared, it was a fairly simple matter of developing  
3     a template for each of these figures and tables and then  
4     writing software code. I say a relatively simple matter,  
5     but to run the code to produce all of these reports for  
6     every pharmacy in the country literally takes a few days of  
7     computer time on several fast computers to run, but once  
8     it's programmed, it creates the same report for every --  
9     every pharmacy.

10    **Q.** Mr. Schmidt asked you about the scale of a couple of  
11    particular charts. Are there individuals in your office  
12    that sit and create chart by chart by chart subjectively  
13    changing the scale on each chart?

14    **A.** No. All of that is programmed and it's programmed just  
15    as we saw on those couple of examples so that the vertical  
16    scale just exceeds the highest bar on the chart. That's the  
17    way the program is written and I think the right way to  
18    reflect the data.

19    **Q.** Dr. McCann, you were asked yesterday about your  
20    compensation for the work in this case. Would you please  
21    explain to the Court the number of different bellwethers  
22    you've worked on for the MDL or the Executive Committee?

23    **A.** Well, initially, there was a lot of work done just  
24    generally for the MDL. The first year or year and a half's  
25    worth of work, I think, was sort of general purpose work.

1 And then, I've done work specifically on what we've been  
2 referring to as CT21, CT2 and CT23. Some of that work,  
3 significantly in addition to the sort of common development  
4 that was done on -- during the initial year.

5 **Q.** Let me just -- instead of the acronyms, let's, if you  
6 would, help the Court with the counties. We have Cabell  
7 County. You list them off for the Court.

8 **A.** So, Cabell County and the City of Huntington here.  
9 Initially, it was Cuyahoga and Summit County. And then,  
10 more recently, I filed an expert report and will give a  
11 deposition in Lakewood in Trumbull County.

12 **Q.** San Francisco?

13 **A.** San Francisco.

14 **Q.** Have you also done work on the New York case on behalf  
15 of the MDL even though that's a state court case?

16 **A.** Yes. I filed an expert report, gave a deposition, and  
17 testified during a Frye hearing.

18 **Q.** Are there active Attorney General cases that you're  
19 working on around the country, as well?

20 **A.** Yes. There's somewhere between eight and twelve. I'm  
21 not just sure exactly how many, but quite a large number,  
22 and then some other sort of work that doesn't fall into  
23 either of those two categories.

24 **Q.** Dr. McCann, Mr. Mahady yesterday asked you about a  
25 Texas federal court opinion and asked you to read a couple

1 of sections off the lower court opinion, correct, sir?

2 **A.** Right. Not the -- not the opinion on the motion to  
3 vacate, but an opinion denying my motion to intervene.

4 **Q.** And, Dr. McCann, so the Court understands the whole  
5 story --

6 MR. MOUGEY: May I approach, Your Honor?

7 THE COURT: Yes.

8 BY MR. MOUGEY:

9 **Q.** And the entire picture, I've handed you, sir, the Fifth  
10 Circuit opinion. Dr. McCann, just to cover this briefly, if  
11 you would, sir, turn to Westlaw Page 2.

12 **A.** Yes.

13 **Q.** And the sentence three quarters of the way down the  
14 paragraph on the right -- left-hand side that begins with  
15 "The District Court vacated", would you please read that  
16 sentence into court? Actually, the next two sentences?

17 **A.** "The District Court vacated the award and granted  
18 Morgan Keegan attorneys' fees and expenses. The Court based  
19 its decision on a finding that either the award was procured  
20 by fraud or, alternatively, that the arbitration panel  
21 exceeded its powers. Because we conclude that these  
22 holdings were in error, we reverse and remand with the --  
23 with instructions to enter judgment enforcing the  
24 arbitration award."

25 **Q.** Dr. McCann, would you please turn to Page 4 and read

1 the last sentence of the Fifth Circuit's reversal under the  
2 underlying court that begins with, "Thus, even"?

3 **A.** "Thus, even if the evidence supported a finding of  
4 fraud, which it does not, this prong is unsatisfied. We  
5 conclude that the District Court erred in vacating the  
6 arbitration award on fraud grounds and expressly vacate the  
7 finding that Dr. McCann committed fraud."

8 **Q.** Dr. McCann, would you please turn to Page 6 and read  
9 Footnote 4 into the record?

10 **A.** "We note, however, the total absence of any evidence  
11 supporting a finding that Dr. McCann committed intentional  
12 fraud. The evidence presented supports nothing more than a  
13 conclusion that a member of Dr. McCann's staff made a  
14 calculation error that he did not discover until after he  
15 testified in the *Garrett* arbitration."

16 **Q.** All right. Dr. McCann, I would like to go full circle  
17 to where we started on Exhibit 44711, Page 17.

18 **A.** Yes.

19 MR. MOUGEY: Bear with me, Your Honor.

20 BY MR. MOUGEY:

21 **Q.** Dr. McCann, these were the markings that I made on the  
22 board yesterday as we were going through Page 17 and I want  
23 to just conclude with just a couple of questions from these  
24 charts.

25 This top conclusory row that I have circled with 63

1 dosage units per cap from The Big Three, 37 from West  
2 Virginia and 17.08, are those from simply retail and chain  
3 pharmacies?

4 **A.** Yes.

5 **Q.** And, Dr. McCann, are these the NPI definition of retail  
6 and chain pharmacies or the NPI definition of retail and  
7 chain pharmacies?

8 **A.** These are the DEA/ARCOS definition.

9 **Q.** And Mr. Schmidt asked you several questions about your  
10 testimony that had left off the VA and -- from McKesson's  
11 numbers, correct, sir?

12 **A.** Correct.

13 **Q.** And as we evidenced on Page 17, sir, what were the  
14 numbers that were focused on when reviewing Page 17 of  
15 Exhibit 44711?

16 **A.** The retail and chain pharmacies, the VA is listed  
17 there, but my focus and your notations are on the retail and  
18 chain pharmacies, and we -- we did not count the VA clinic  
19 shipments against McKesson in this calculation.

20 **Q.** And, Dr. McCann, on Page 18 of the same exhibit with  
21 all three of the defendants, does the following slide  
22 include the VA?

23 **A.** No, it does not.

24 **Q.** And, Dr. McCann, did you use the NPI definition of  
25 retail and chain pharmacies in -- on Page 18?

1     **A.**    Yes.  That is the way we've been saying it.  Perhaps a  
2     slightly different way of saying it is we used the NPI  
3     Dictionary to identify what we thought were closed-door  
4     facilities and I articulate in the report the six or seven  
5     categories under the NPI Dictionary that would be  
6     closed-door pharmacies.  And so, we take those out of the  
7     retail and chain pharmacies identified by ARCOS to create  
8     this exhibit.

9     **Q.**    And we've covered a lot of summary data the last two  
10    and a half days, Dr. McCann.  Just 30,000-foot-view, what  
11    impact does using the NPI definition of retail and chain  
12    have on the number of dosage units that came into Cabell  
13    County?

14   **A.**    Well, it reduces the number a little bit because it  
15    doesn't include extended care facilities and other what  
16    we've called closed-door facilities.

17   **Q.**    Can we move back one page, please?  So, Dr. McCann, the  
18    57.09 dosage unit number excludes chain -- I'm sorry --  
19    excludes closed-door and mail order pharmacies, correct?

20   **A.**    That's correct.

21   **Q.**    Would you consider then the NPI definition more  
22    conservative or more aggressive when calculating the number  
23    of dosage units into Cabell County through retail and chain  
24    pharmacies?

25   **A.**    Well, it's more conservative.  First, we excluded, of



1 course, the VA clinic and all other hospitals and clinics,  
2 but then we further exclude any extended care facilities.  
3 So, the numbers across the board are about ten percent lower  
4 when you exclude those extended care facilities and similar  
5 closed-door pharmacies.

6 **Q.** Now, Dr. McCann, this Page 18 was in the first exhibit  
7 that we covered when you were on the stand in the first  
8 couple of hours. Every number, almost every number that you  
9 gave the Court from that point for the rest of the time you  
10 testified on retail and chain, did that include the NPI  
11 definition of retail and chain or the ARCOS definition of  
12 retail and chain?

13 MR. MAHADY: Your Honor, leading.

14 THE COURT: Sustained.

15 BY MR. MOUGEY:

16 **Q.** Did you use the NPI definition or the ARCOS definition  
17 after this slide pointing out the differentiation?

18 **A.** In each section, when we got to the first time, the NPI  
19 definitions were used. The rest of the illustration's  
20 subtotals that followed within that packet were -- were  
21 based on the NPI definitions.

22 **Q.** Dr. McCann, when I took a -- when you and I calculated  
23 the summary slides for the 81,229,625 dosage units of  
24 oxycodone and hydrocodone into Cabell County, did this  
25 include just retail and chain pharmacies?

1       **A.**     Yes.

2       **Q.**     Did 81 million and some change include only the NPI  
3       definition?

4       **A.**     Yes.

5       **Q.**     Are your answers the same for the 980,649,200 dosage  
6       units of oxycodone and hydrocodone into Cabell County?

7       **A.**     Yes.

8               MR. MOUGEY: No further questions, Your Honor.

9               THE COURT: Is there any recross?

10              MR. MAHADY: Good afternoon, Your Honor.

11              Dr. McCann, I have no additional questions. Thank you  
12       for your time.

13              THE WITNESS: Thank you.

14              MR. SCHMIDT: Your Honor, no additional recross.

15              Thank you, Dr. McCann.

16              THE COURT: Ms. Salgado?

17              MS. SALGADO: No additional recross from me.

18              Thanks very much, Dr. McCann.

19              THE COURT: Well, I want to ask you a couple of  
20       questions before we turn you loose here, Dr. McCann. I  
21       believe you said you -- in considering the ARCOS data, you  
22       made eight different kinds of changes to that data in  
23       constructing the exhibits that have been offered here, the  
24       summary charts. One of the things you excluded were the  
25       transactions where the action indicator, code correction

1 number, or both, suggests that the reported transaction is  
2 erroneous. Just tell me how you made that determination.  
3 How did you know it was erroneous?

4 THE WITNESS: Well *The ARCOS Handbook* says that  
5 both of those fields can't be filled in simultaneously in a  
6 transaction. So, when we saw that, and it's in a very small  
7 number of transactions, less than one hundredth of 1%, but  
8 where we saw both of those fields filled in, it's  
9 inconsistent with *The ARCOS Handbook* and so, we excluded  
10 those transactions.

11 THE COURT: You also excluded transactions  
12 involving reverse distributors and some other people and you  
13 concluded that reverse distributors overstate the quantity  
14 of opioids shipped for destruction. How did you know that?

15 THE WITNESS: Well, so the reverse distributors  
16 are primarily receiving opioids and shipping them where  
17 they're going to be destroyed to analytical labs. Both the  
18 reverse distributors and the analytical labs have DEA  
19 registration numbers. And so, we could see that the receipt  
20 of the -- of the drug by the reverse distributor, typically  
21 from a manufacturer or a distributor, we could see it being  
22 reported both by the manufacturer and distributor. We can  
23 see it simultaneously being reported by the reverse  
24 distributor. And then, we see the follow-on transaction to  
25 the DEA's destruction facility, the analytical lab. We see

1 both sides identifying it or reporting it, the reverse  
2 distributor and the analytical lab.

3 Now, the critical thing is that the analytical lab is  
4 reporting one side of the transaction coming from the  
5 distributor and one side of it coming -- going on to the  
6 analytical lab for destruction. The distributors' and  
7 manufacturers' side of that reporting appears to be  
8 accurate.

9 The -- on the very same transaction, the reverse  
10 distributor reports a quantity that is maybe a million times  
11 or a billion times higher. And the same thing when that  
12 reverse distributor reports the transaction to the DEA  
13 analytical lab for destruction, it's being reported both by  
14 the DEA analytical lab and by the reverse distributor.

15 And, again, we see the reverse distributor reporting a  
16 number that is maybe a billion times higher than what's  
17 coming into the analytical lab. So, the -- it's really one  
18 -- primarily one reverse distributor in Alabama that seemed  
19 to just code the units wrong, calling something maybe  
20 kilograms instead of micrograms, and so they're off by a  
21 factor of a million or a billion.

22 It turns out none of those transactions are included in  
23 shipments from manufacturers to distributors, but it was  
24 fairly easy to see that those were all in error. We could  
25 check the reverse distributors' reporting against the

1 distributors of the same transaction. We could also check  
2 it against the analytical lab. So, we know that they're  
3 wrong.

4 It's not an exaggeration to say that some of the  
5 shipments reflect from the -- as reported by the reverse  
6 distributor reflect what would be whole trainloads of  
7 Fentanyl, which we know were not shipped from Alabama to  
8 Miami.

9 THE COURT: Similarly, you eliminated transactions  
10 with obvious errors. How do you determine what error is  
11 obvious and what isn't? Is that a subjective determination  
12 on your part or do you have some objective standard that you  
13 use there?

14 THE WITNESS: I don't believe that there was any  
15 subjectivity used in any of this. I've tried to lay out the  
16 steps. So, for instance, we -- we observed some -- some of  
17 the data produced by the government includes and, for that  
18 matter, by some of the defendants in their transaction data,  
19 some NDC codes that don't reflect opioids. And so, those  
20 shouldn't have been included in the production, and we would  
21 not -- we would include those.

22 We -- and in another example on that list, there were,  
23 as I said, if -- if two DEA registrants are involved in a  
24 transaction and they're reporting registrants, both of them  
25 report the transaction and we wouldn't count both of those

1 reported transactions. That would be double counting the  
2 shipment from one party to another.

3 So, each step we took were instances like that where  
4 there was some very obvious reason why that item should not  
5 be included. The one that was discussed yesterday at some  
6 length was the R transactions and I could articulate why the  
7 R transactions were included in the summaries. But for each  
8 thing that we did, I believe it was objective and clear. I  
9 don't believe there was really any subjectivity.

10 THE COURT: Okay. I want to ask you about the  
11 pharmacies that were selected by the plaintiffs' counsel  
12 that were outside the geographical area here. If you take  
13 those out, would that have changed any of your ultimate  
14 conclusions?

15 THE WITNESS: No. I don't believe so. All -- I  
16 can elaborate, if you like.

17 THE COURT: Yes, please.

18 THE WITNESS: I apologize. Sometimes my answers  
19 are too long.

20 THE COURT: Well, I'm going to exempt you  
21 temporarily from that, Dr. McCann.

22 THE WITNESS: Thank you, Your Honor. The primary  
23 opinions that I gave were about the levels of opioids that  
24 were shipped into Cabell County and West Virginia and I sort  
25 of subset those quantities in various ways by year, by

1 distributor, by drug, by drug strength.

2 And then, with Mr. Mougey's help, I pointed out the  
3 percentage increases between one year and another year for  
4 some of these items. None of that would be affected by not  
5 including those pharmacies outside of Cabell County and  
6 Huntington.

7 Also, none of that would be affected except  
8 imperceptibly by treating the R Transactions differently  
9 than we did. So, I don't really believe that any of my  
10 conclusions -- and, in fact, I feel confident that none of  
11 the conclusions that I expressed would be changed by any of  
12 the discussion we've had here the last day and a half.

13 THE COURT: So, if I understand, your testimony is  
14 even though you made eight changes to the ARCOS data, eight  
15 different types of changes, none of the changes  
16 significantly impacted or affected your ultimate  
17 conclusions; is that correct? That's a bad question.

18 What I'm driving at is, is the final product ARCOS data  
19 or is it yours? Is it your interpretation of that? I mean  
20 --

21 THE WITNESS: No. It's ARCOS data. If I may, you  
22 could think of -- the most of the reports that I -- I  
23 explained were for Cabell County and the City of Huntington.  
24 So, if you think about it conceptually, the ARCOS data  
25 starts with the entire nation. So, most of my reports

1 narrow down this geographic scope to the City of Huntington  
2 and Cabell County.

3 In similar ways, my analysis first narrows the scope to  
4 shipments from distributors to pharmacies in Huntington  
5 County (sic). So, when you see that I made eight changes, a  
6 significant part of that is excluding the transactions that  
7 didn't involve shipments from distributors to pharmacies,  
8 just like I don't include tables and charts on Washington  
9 State. I narrow the geographic scope and then I further  
10 narrow the data to be shipments to pharmacies in -- or  
11 dispensers generally in Cabell County and the City of  
12 Huntington.

13 Once you do that and don't double count by making sure  
14 that you're not including the same transaction twice because  
15 they're reported by two different registrants, what's left  
16 is what I would call corrections after that. And the  
17 corrections account for something like less than a tenth of  
18 1%, maybe less than five one hundredths of a percent.

19 So, there's -- what I -- what I summarize here is ARCOS  
20 data with very minimal, very minimal corrections, trivial.

21 THE COURT: Does counsel want to ask him anything  
22 based on what I asked him?

23 MR. MAHADY: Your Honor, I think a number of the  
24 questions you asked got at the processing of the underlying  
25 data. I believe Dr. McCann testified yesterday that there



1 was a distinction between the processing phase of his work  
2 and the analysis side of his work.

3 BY MR. MAHADY:

4 **Q.** Would the eight exclusions, Dr. McCann --

5 MR. MAHADY: If I may ask the question?

6 THE COURT: Yes, please.

7 BY MR. MAHADY:

8 **Q.** Did that relate primarily to the processing side of  
9 your work to get you a dataset that you could then analyze?

10 **A.** No. The -- at least measured by -- by dosage units, or  
11 weight, or MME, the vast majority was narrowing the focus to  
12 the shipments from distributors to dispensers. That gets  
13 rid of the problem with the reverse distributors and it gets  
14 rid of the double counting of the same shipment counted  
15 twice in the records. That's the vast majority.

16 And you really should think of that as prior to  
17 processing, although you could do -- you could process the  
18 entire database and then subset it down to shipments from  
19 distributors to dispensers or it's the same logically. You  
20 could think of it as narrowing the raw ARCOS to shipments  
21 from distributors to dispensers and then processing from  
22 that point. It's the same thing.

23 **Q.** Okay. But the decision not to include transaction  
24 codes that may reflect an offset on the shipments, that was  
25 not merely processing the data to get it in a useable form,

1 correct? That was a decision that you made in performing  
2 your analysis?

3 **A.** Yes. I've offered to explain that three times. No one  
4 wants to take me up on it.

5 THE COURT: Well, I'm going to take you up on it  
6 right now.

7 THE WITNESS: Thank you, Your Honor. I've been  
8 dying. So, there was an example presented to you yesterday  
9 in my cross examination of McCloud Pharmacy and one  
10 particular month where there was 15,000 pills returned out  
11 of I think it was 57,000 gross shipped that month. What --  
12 what I wanted to explain is that these R Transactions account  
13 for approximately six tenths of 1% of the shipment data and  
14 of the -- of the shipments from wholesalers and distributors  
15 to dispensers.

16 And there are problems with that R coded data. There  
17 are problems with their interpretation and, even if you can  
18 agree on the interpretation, there are problems with how it  
19 ought to be presented in graphs and tables.

20 A perfect example would be, earlier today, I was asked  
21 about switches from self-distributing CVS to, I believe it  
22 was Cardinal Health, or perhaps yesterday, switches between  
23 one distributor to a Fruth Pharmacy and another distributor.

24 Now, what you see in those R Transactions is if you  
25 just look at, for instance, Cardinal Health's shipments to

1 that pharmacy, you see a -- an R Transaction in an NDC code  
2 with no prior purchase. So, in the Cardinal Health data  
3 right here in Cabell County, in the City of Huntington, you  
4 can see lots of examples of returns that -- with no prior  
5 purchase of that same NDC code from Cardinal Health.

6 Well, if you dig a little bit deeper, what you'll see  
7 is the previous distributor maybe shipped that NDC code to  
8 that pharmacy a year earlier. In the intervening year, the  
9 pharmacy changes distributors and perhaps it's not an error.  
10 Perhaps it really is a return to the Cardinal, the new  
11 distributor of an NDC package that was bought at a previous  
12 distributor.

13 Now, when I'm calculating market shares, should that  
14 return be counted as an offset against the previous  
15 distributor, maybe AmerisourceBergen, of a thousand pills or  
16 should it be counted as an an offset against Cardinal  
17 Health's contemporaneous shipments because it was initially  
18 shipped by AmerisourceBergen? Should we continue to count  
19 that as a thousand pills in the AmerisourceBergen or should  
20 we credit AmerisourceBergen and count the full 57,000 pills  
21 against Cardinal?

22 It turns out that across all three distributors,  
23 whether you're looking at nationally, West Virginia or  
24 Huntington and the -- and Cabell County, the percent that  
25 these R Transactions plus the Ps, which may reflect a

1 return, account for approximately six tenths of 1% of the  
2 shipments.

3 The graph that we're looking at on the white board  
4 there would not be changed. If you took out about one-half  
5 of 1% of the heights of those bars, the -- the numbers that  
6 were in the tables that I presented to you showing the total  
7 shipments or the per capita shipments from these  
8 distributors would not change beyond the rounding error and  
9 the percentage increases over time or the relative  
10 magnitudes of the shipments in Cabell County and the City of  
11 Huntington to West Virginia and the country would change in  
12 no way.

13 So, it was my view -- we do use the R Transactions in  
14 some testimony that I'll offer you later in a few weeks, but  
15 for purposes of the tables that I put in front of you here  
16 this week, those R Transactions don't belong.

17 MR. MAHADY: Your Honor, if I just may ask a few  
18 follow-up questions?

19 THE COURT: Yes, please.

20 **CROSS EXAMINATION**

21 **BY MR. MAHADY:**

22 **Q.** In the case of McCloud Family Pharmacy,  
23 AmerisourceBergen was the only pharmacy servicing McCloud in  
24 October of 2011, when those 15,200 pills were returned to  
25 AmerisourceBergen, correct?

1       **A.**     Correct.

2       **Q.**     And AmerisourceBergen, based off of your analysis, was  
3     not credited with the return of those 15,200 pills, correct?

4       **A.**     Correct.

5       **Q.**     And the chart that you demonstrated to the Court did  
6     not reflect AmerisourceBergen being credited with those  
7     15,200 pills, correct?

8       **A.**     Correct, for the reasons I just explained.

9       **Q.**     Okay. And I know you just testified that your work was  
10    really the ARCOS data, but a lot of your work and a lot of  
11    the charts are based off of per capita analysis and we can  
12    agree, right, that you cannot do a per capita analysis just  
13    based off the ARCOS data alone? You need to introduce a  
14    separate dataset and, in this case, that was the U. S.  
15    Census Bureau data, correct, Dr. McCann?

16    **A.**     Yes. I wouldn't say it was a lot of what I presented,  
17    but to the extent that there were per capita numbers, those  
18    are based on -- including the Census data numbers.

19    **Q.**     Okay.

20               MR. MAHADY: I have no further questions, Your  
21    Honor. I'm not sure if McKesson or Cardinal do.

22               THE COURT: Mr. Schmidt, do you want to ask him  
23    anything?

24               MR. SCHMIDT: Yes. I was going to ask the Census  
25    question, but Mr. Mahady covered it, so I'll just ask two

1 others.

2 **CROSS EXAMINATION**

3 **BY MR. SCHMIDT:**

4 **Q.** Do you see that chart up there that's, I think, set up  
5 for the next witness that's based on your work, Dr. McCann?

6 **A.** Yes.

7 **Q.** Is that MME data?

8 **A.** Yes. I'm sorry. No, it's calculated base weight in  
9 grams.

10 COURT REPORTER: I'm sorry. Could you repeat  
11 that?

12 THE WITNESS: It's what's referred to as  
13 calculated base weight in grams.

14 COURT REPORTER: Thank you.

15 **BY MR. SCHMIDT:**

16 **Q.** You did perform various MME calculations, correct?

17 **A.** Correct.

18 **Q.** And those MME -- the MME data that you used, that does  
19 not appear in ARCOS, correct?

20 **A.** Correct.

21 **Q.** You had to draw documentation and data from the CDC to  
22 conduct conversions for the MME data, correct?

23 **A.** Correct.

24 **Q.** And in other of your analyses, including some we just  
25 looked at, you used NPI pharmacy types to sort some of your

1       ARCOS data according to those NPI pharmacies types, correct?

2       **A.**     Correct.

3               MR. SCHMIDT:   Thank you.

4               THE COURT:   Ms. Salgado?

5                               **CROSS EXAMINATION**

6                       **BY MS. SALGADO:**

7       **Q.**     Dr. McCann, you testified just now that the exclusion  
8       of the R and P data did not affect -- or was diminimous  
9       essentially on an aggregate level; is that right?

10      **A.**     Correct.

11      **Q.**     But you would agree, wouldn't you, that when you drill  
12      down to the pharmacy level and particular transactions, for  
13      example, in the McCloud example, there could be a material  
14      difference in what you're seeing in the transactional level  
15      for that pharmacy and what actually occurred; do you agree  
16      with that?

17      **A.**     Well, there could be, but even in the McCloud case, it  
18      accounted -- it amounted to about 2% of the total shipments  
19      to McCloud. As I said, on average, it's about seven tenths  
20      of a percent across Cabell County, West Virginia and the  
21      country. For McCloud, it was around 2%.

22      **Q.**     And if we're looking at particular transactions for  
23      McCloud, though, it could affect what we see as the  
24      particular -- what was shipped in a particular month and  
25      whether that volume was particularly high or low? It could

1 impact that, correct?

2 **A.** No. Those are still shipments to McCloud. The only  
3 question is whether either earlier in the month or later in  
4 the month, if there were -- if there were returns to the  
5 distributor, maybe not the distributor that first sent the  
6 drugs to McCloud, but if there are returns to the  
7 distributor, how they should be treated. And for the  
8 reasons I explained for these charts and tables, I don't  
9 believe they should be included.

10 **Q.** Right. And I guess I understand that the other data  
11 still reflects the shipments, but the charts that you show  
12 may not reflect the net shipments that went from that  
13 particular distributor to that particular pharmacy in a  
14 particular month if there were returns, correct?

15 **A.** Correct.

16 MS. SALGADO: Thank you.

17 MR. MOUGEY: Your Honor, I'm still here behind the  
18 podium.

19 THE COURT: Are you back there, Mr. Mougey?

20 MR. MOUGEY: I may have just a couple quick  
21 follow-up.

22 **EXAMINATION**

23 **BY MR. MOUGEY:**

24 **Q.** The eight, I'll call them categories that Your Honor  
25 mentioned, Dr. McCann, are you familiar with the terms



1 correlation coefficient?

2 **A.** Yes.

3 **Q.** Is -- explain to the Court what correlation coefficient  
4 is just very 30,000-foot.

5 **A.** Well, it's a measure of how two variables move  
6 together, how observations on those two variables relate to  
7 one another either what we call positively, if they go up  
8 and down together around their averages after you subtract  
9 their averages or negatively if they move in opposite  
10 directions.

11 **Q.** Is the correlation coefficient a mathematical  
12 computation that is routinely used by experts when comparing  
13 different datasets?

14 **A.** Yes.

15 **Q.** And were you able in this case, despite the eight  
16 categories and some of the issues raised, were you able to  
17 perform a correlation coefficient calculation on the ARCOS  
18 dataset in comparison to the defendant's transactional  
19 dataset?

20 **A.** Yes. I report that in my expert report.

21 **Q.** And, Dr. McCann, would you explain the kind of  
22 numerical range from perfectly inversely correlated to no  
23 correlation to perfectly correlated?

24 **A.** Sure. A negatively correlated, a perfectly negatively  
25 correlated variable, would have a -- pair of variables would

1 have a correlation coefficient of minus one and a perfectly  
2 positively correlated pair variables would have a  
3 correlation coefficient of plus one. You can think of plus  
4 one as being really even just the same thing measured twice  
5 in different units.

6 So, if we measured people's heights here in inches and  
7 then in centimeters, you know, everybody has the same  
8 height. It's the same distribution of heights. We're just  
9 measuring them two different ways. If you calculate a  
10 correlation coefficient across those two series, the  
11 correlation coefficient would be one. It would be 1.00.

12 **Q.** Now, Dr. McCann, were you able to calculate the  
13 correlation coefficient based on the West Virginia dataset  
14 and the defendants' transactional dataset?

15 **A.** Yes.

16 **Q.** And what was that correlation coefficient, Dr. McCann?

17 **A.** Well, we report a couple of different things. I'd have  
18 to -- the precise number, I would have to look up, but it's  
19 .99-something. These are perfectly correlated, just as the  
20 ARCOS data, once we've -- we've sort of subset it down to  
21 the shipments to dispensers and made the corrections that we  
22 made, the correlation between it and the Retail Drug Summary  
23 Reports is .999 or something. These are effectively the  
24 same datasets.

25 **Q.** Dr. McCann, the pharmacies outside of Cabell County on

1 the larger spreadsheets, were these -- were these given any  
2 additional or different weight in the series of summaries  
3 than other pharmacies in West Virginia?

4 **A.** No. The statewide average is -- just includes all of  
5 the pharmacies and, to the extent there are one or two  
6 pharmacies on the spreadsheet that are not in the state,  
7 they're not included at all in the calculations.

8 MR. MOUGEY: No further questions, Your Honor.  
9 Thank you.

10 THE COURT: And you used the ARCOS data and  
11 information submitted by the defendants?

12 THE WITNESS: Correct.

13 THE COURT: And where it overlapped, you made  
14 appropriate adjustments?

15 THE WITNESS: Right. The overlap is almost  
16 perfect. It's really where they didn't overlap or there  
17 might have been a few transactions missing, let's say, from  
18 the ARCOS data. Cardinal Health was the example we talked a  
19 little bit about.

20 There were three weeks in March of 2008. For some  
21 reason, the ARCOS data shows blanks for Cardinal during that  
22 time period, but the Cardinal data produced in discovery  
23 shows shipments during those three weeks. And so, we import  
24 those shipments from the Cardinal data into the ARCOS data  
25 before we do the analysis and that's actually necessary.

1 That then allows the ARCOS data to match up with the Retail  
2 Drug Summary Reports in that quarter.

3 So, it's -- other than that, there might be -- there  
4 might be a few transactions here or there that we found in  
5 the defendant transaction data not in the ARCOS data and  
6 brought it over, but it was primarily really just those  
7 three weeks in March.

8 THE COURT: Okay. Let me -- let me ask counsel,  
9 is there any argument about whether the ARCOS data and the  
10 defendants' discovery data used by Dr. McCann are admissible  
11 in evidence? Is there any argument about the admissibility  
12 of any of that?

13 MR. MAHADY: Your Honor, the processed ARCOS data,  
14 like the whole set, or are you just talking about --

15 THE COURT: What he used?

16 MR. MAHADY: I don't think that there's an issue  
17 with the underlying data or R transactional data. I think  
18 where the rub is, is with his analysis and subjective  
19 decisions that were made in the supplementation with it.

20 So, as far as AmerisourceBergen goes for R  
21 transactional data, I do not think that there is an issue as  
22 to whether or not it is admissible. It's more of the  
23 analysis. And that's really the rub that we're going to be  
24 briefing.

25 MR. SCHMIDT: And that's where we are, as well,

1 Your Honor, for McKesson.

2 MS. SALGADO: Same for Cardinal Health, Your  
3 Honor.

4 THE COURT: Well, as I understand it, for Rule  
5 1006 apply, the data has to be admissible in evidence. It  
6 doesn't have to be admitted, but it has to be admissible; is  
7 that right?

8 MR. MAHADY: Right. It has to be -- the  
9 underlying data that's being summarized has to be admissible  
10 and the summary has to be an objective summary of that data.

11 THE COURT: And you're telling me that you don't  
12 have any quarrel about the admissibility of the underlying  
13 data, right?

14 MR. MAHADY: I think that's correct, Your Honor.

15 MR. SCHMIDT: Our quarrel is with the adjustments  
16 that have been made to it and merging datasets.

17 THE COURT: Right. I understand that.

18 MS. SALGADO: Yes, Your Honor.

19 MR. MOUGEY: I agree that's where the difference  
20 is and that's what we're going to brief, Your Honor.

21 THE COURT: May Dr. McCann be temporarily excused?

22 MR. MAHADY: Yes.

23 MS. SALGADO: Yes, Your Honor.

24 MR. MAHADY: He may not come back.

25 THE COURT: Dr. McCann, thank you very much.

1 You're free to go until you have to come back.

2 THE WITNESS: Thank you. If I may, Your Honor,  
3 it's been a pleasure and an honor. Thank you.

4 THE COURT: Thank you.

5 All right. Here's what I'm going to do on the -- on  
6 the big issue. I'm going to conditionally admit the  
7 summaries under Rule 1006 at this time subject to possibly  
8 revising or reversing that ruling after I receive the briefs  
9 and allow the plaintiffs to proceed and use the summaries in  
10 their questioning, but with a warning. They do so at their  
11 peril. If I ultimately determine that the charts are not  
12 admissible, that may require striking some or all of the  
13 accompanying testimony.

14 So, rather than delay things, I'm going to -- we're  
15 going to move forward on that basis and you all can put your  
16 objections on the record, if you wish.

17 MR. SCHMIDT: Yes. I think we've maintained our  
18 objections on the 1006 and will through our briefing. It's  
19 not ripe now, but I do want to flag a subsidiary issue,  
20 which is this geographic scope issue, particularly with  
21 respect to the pharmacies outside of Huntington-Cabell. I  
22 think it is a distinct issue and I think that will come up  
23 in the context of specific witness testimony, but I just  
24 wanted to put a marker down for that.

25 MS. SALGADO: Same objections, Your Honor.

1 THE COURT: Mr. Mahady?

2 MR. MAHADY: Same objections, Your Honor.

3 THE COURT: All right.

4 All right. Mr. Farrell, if you're ready to go, you can  
5 call your next witness.

6 MR. FARRELL: Yes, sir. Plaintiffs call Chris  
7 Zimmerman.

8 Judge, if you don't mind, we've got just a few minutes  
9 of moving papers.

10 THE COURT: No, not at all.

11 (Pause)

12 THE COURT: Mr. Zimmerman, you may take the  
13 witness stand. Wait a minute.

14 LAW CLERK: Wait.

15 THE COURT: She needs to swear you first.

16 THE WITNESS: Oh, I'm sorry.

17 LAW CLERK: Please raise your right hand.

18 **CHRIS ZIMMERMAN, PLAINTIFF WITNESS, SWORN**

19 COURTROOM DEPUTY CLERK: Thank you. Please be  
20 seated.

21 MR. MAHADY: Judge, we have a pileup of documents  
22 the witnesses have been seeing. Your Honor, may I come up  
23 here just to grab this stuff?

24 THE COURT: Yes, please.

25 **DIRECT EXAMINATION**

**BY MR. FARRELL:**

**Q.** Good afternoon. Would you please state your name for the record?

**A.** Good afternoon. My name is Chris Zimmerman.

**Q.** And which of the parties here are you identified with?

**A.** I identify with the AmerisourceBergen Drug Company.

**Q.** What is your current role?

**A.** My current title is Senior Vice President of Corporate Security and Regulatory Affairs.

**Q.** Mr. Zimmerman, you've been employed with AmerisourceBergen since 1990?

**A.** That's correct.

**Q.** And my records or my notes indicate that you took the role of Vice President of Corporate Security and Regulatory Affairs sometime in 2001; is that accurate?

**A.** That's accurate, correct.

**Q.** Approximately when in 2001?

**A.** I think it was probably -- it was after the merger, so probably around August. I'm not sure.

**Q.** The merger, I think, is March of 2001, so does that give you a better idea?

**A.** So, it would have been -- let me rephrase that. I think it was towards the end of 2001. I'm not sure exactly the month.

**Q.** And so, Corporate Security and Regulatory Affairs, the



1 shorthand for that at AmerisourceBergen is CSRA; is that  
2 right?

3 **A.** That's correct.

4 **Q.** So, I may use that as shorthand as we -- as we move on.

5 **A.** Most people have forgotten about the Corporate Security  
6 and Regulatory Affairs part. CSRA is quite normal.

7 **Q.** The other reference point I saw is that your title  
8 sometimes was shortened from Senior Vice President of  
9 Corporate Security and Regulatory Affairs down to Chief  
10 Compliance Officer. Is that a fair depiction?

11 **A.** No. I've always -- since that 2001 time frame, I've  
12 always been Senior Vice President of CSRA and there was a  
13 period of time where I was, in addition to that, also the  
14 Chief Compliance Officer.

15 **Q.** That's a separate role?

16 **A.** It's a separate title. Additional title. Both titles.

17 **Q.** I'm going to try and front-end to load in some facts  
18 for the record. As the Senior Vice President of CSRA, do  
19 you acknowledge that AmerisourceBergen sold 36 million pills  
20 of hydrocodone and Oxycodone to pharmacies in Huntington and  
21 Cabell County?

22 **A.** I don't --

23 MR. NICHOLAS: Objection. I'll object for lack of  
24 foundation.

25 THE COURT: Well, what do you have to say about

1 that, Mr. Farrell?

2 MR. FARRELL: Well, I would find it interesting if  
3 the Vice President of Corporate Security and Regulatory  
4 Affairs doesn't know how many pills were sold.

5 THE COURT: Well, do you know the answer to that,  
6 Mr. Zimmerman?

7 THE WITNESS: I don't know the exact number of  
8 pills that were sold.

9 THE COURT: I'll sustain the objection.

10 BY MR. FARRELL:

11 Q. At any point in time have you looked to determine how  
12 many pills AmerisourceBergen sold to Huntington, Cabell  
13 County, West Virginia?

14 A. Me personally?

15 Q. You personally?

16 A. No.

17 Q. How about anybody under your -- your command?

18 A. The people in my department are constantly looking at  
19 data in certain areas and customers and pharmacies. That's  
20 just part of their normal duty.

21 Q. Are you aware of how many pills of hydrocodone and  
22 oxycodone were sold by AmerisourceBergen to SafeScript  
23 Pharmacy in Huntington, West Virginia?

24 A. I don't know the exact number, no.

25 Q. And can you estimate?

1       **A.**    I wouldn't want to estimate, no.

2       **Q.**    Well, the same applies to any other pharmacy in  
3       Huntington and Cabell County.  Sitting here today, you do  
4       not know the numbers of pills sold by AmerisourceBergen?

5       **A.**    I don't know the exact number of pills and I'm not sure  
6       if your question is for like annually, what length of time  
7       period.

8       **Q.**    Well, if I were to modify my question to include a time  
9       increment like annually or monthly, would that -- would you  
10      be able to offer any testimony on that?

11      **A.**    No.  I wouldn't know the exact numbers for any of that.

12      **Q.**    And I'm not -- I'm not asking you to memorize or guess.  
13      I'm just trying to get a feel before we go down the road of  
14      what your knowledge base is.

15      **A.**    I --

16      **Q.**    I'd like --

17      **A.**    Oh, sorry.

18      **Q.**    Go ahead.

19      **A.**    I was going to say, I know we've sold products into  
20      those counties and those customers.  I just don't know the  
21      exact number.

22      **Q.**    I want to talk briefly about your chain of command.

23                   MR. FARRELL:  And I understand that the -- there  
24      was an objection to the front page.

25                   MR. NICHOLAS:  I'm just not -- I'm not clear on

1 the document. I need to understand better what you've done  
2 on the front page.

3 MR. FARRELL: Okay. Well, how about we just do it  
4 as a demonstrative?

5 Can you bring up -- can you bring up the chain of  
6 command with the Demo 213? Do I need to hit a button?  
7 There we go.

8 Judge, may I step down?

9 THE COURT: Yes.

10 BY MR. FARRELL:

11 Q. Mr. Zimmerman, I don't know if you can see this or read  
12 this or not. I think it's on your camera, as well. I'll  
13 represent to you that we're not going to enter this into the  
14 record, but in general, I'll represent to you in good faith  
15 that this is a document produced by AmerisourceBergen with a  
16 chain of command sometime around 2007 and do you recognize  
17 the general structure of -- that's contained within this  
18 document?

19 A. I do.

20 Q. Okay. Have you seen this document before?

21 A. I've seen a lot of charts in my department and that --  
22 I recognize the individuals in the boxes, so --

23 Q. Would you say that this document, this Demo 213, Page  
24 1, is an accurate depiction of the chain of command for  
25 AmerisourceBergen CSRA in approximately 2007?

1 MR. NICHOLAS: Well, I'll object for lack of  
2 foundation at this point. I mean, he's asking about an org  
3 chart in 2007. I'm not sure it's -- I'm just not sure it's  
4 --

5 THE COURT: Well, he said he didn't recognize the  
6 document, if I understood his testimony.

7 Do you or do you not recognize this as an accurate  
8 diagram, for want of a better term, for AmerisourceBergen at  
9 that time?

10 THE WITNESS: At that time frame, it looks -- it  
11 looks like it could have been. That's the --

12 THE COURT: Okay. I'll overrule the objection.

13 BY MR. FARRELL:

14 Q. So, at the top of the chain of command would be you,  
15 Chris Zimmerman, CSRA, agreed?

16 A. Correct.

17 Q. And then it looks like there is a pyramid of people  
18 that you supervise or oversee. Is that a fair depiction of  
19 what this diagram is intended to portray?

20 A. Those are my -- correct, the reporting structure.

21 Q. This is the reporting structure that you supervise and  
22 oversee, yes?

23 A. Correct.

24 Q. In this, it looks like that Mr. Paul Ross, Bob Crow,  
25 Mr. Bruce Gundy, Mr. Mike Mapes and Mr. Steve Mays report

1 directly to you.

2 MR. NICHOLAS: Your Honor, I'm just -- this is a  
3 minor objection, but he's using the present tense and he's  
4 saying -- he's talking about this as if this is a current  
5 organization and it's not.

6 THE COURT: All right. I'll sustain the  
7 objection. You can put it in a time frame, Mr. Farrell, if  
8 you can.

9 MR. FARRELL: Yes, sir.

10 BY MR. FARRELL:

11 **Q.** I'm going to write here. I'm going to write here in a  
12 different color the numbers 2007. So, just in general, this  
13 would be what your chain of command looks like in the year  
14 2007?

15 **A.** Approximately, yes.

16 **Q.** All right. The next org chart that we pulled is for  
17 sometime around 2011.

18 Can we bring that one up? Well, go to the next one.  
19 Yes, that's it. I think that's it.

20 And, again, it's not a memory contest, but there was an  
21 expansion of the CSRA by AmerisourceBergen and does this  
22 document look like a fair depiction of the chain of command  
23 for CSRA in sometime around 2011?

24 **A.** There's no date on it. It does.

25 **Q.** And I just -- the only reason I really want to do this

1 is because we're going to go through some documents later  
2 with names and I want to go through now and have you  
3 identify some of the people. It's sort of like the  
4 beginning of a playbill where you see the cast of  
5 characters. So, at the very top you see it says "Chris  
6 Zimmerman". That would be you, correct?

7 **A.** Correct.

8 **Q.** All right. We'll start to the left. Mike Mapes, do  
9 you know Mike Mapes?

10 **A.** I do.

11 **Q.** Did he work for you?

12 **A.** He is a consultant.

13 **Q.** And did he consult for you in your role as the Vice  
14 President of CSRA?

15 **A.** He consults for the department, correct.

16 **Q.** And is he still there working?

17 **A.** No.

18 **Q.** But at some -- at points in time, he was within the  
19 command structure and under your supervision?

20 **A.** As a consultant.

21 **Q.** And what about Steve Mays, what was his title and --  
22 who is he and what did he do?

23 **A.** Reading that org chart at that time, he was the Senior  
24 Director of Drug Distribution.

25 **Q.** What does that mean?

1       **A.**    So, he's responsible for CSRA for the drug distribution  
2       business.

3       **Q.**    Okay.  How about Bruce Gundy, do you recognize that  
4       name?

5       **A.**    Yes.

6       **Q.**    And it says here "Director of Corporate Security and  
7       Investigations".  What does that job do under your command?

8       **A.**    So, Bruce Gundy does -- he's exactly what it says.  
9       He's -- well, it's titled Director of Investigations.  So,  
10      he conducts investigations.

11      **Q.**    What would he be investigating?

12      **A.**    Anything from workplace violence, theft, shrinkage,  
13      contract diversion, counterfeit product, anything on the  
14      security --

15      **Q.**    How about -- how about suspicious orders?

16      **A.**    At one time, he could be involved.  He could be also  
17      involved in that portion, as well.

18      **Q.**    How about Clifford Flood, do you recognize that name?

19      **A.**    I do.

20      **Q.**    Okay.  Who is Clifford Flood?

21      **A.**    That slide says his title is Investigator at that  
22      point.  He's no longer with the company.

23      **Q.**    How about Robert Crow?

24      **A.**    Bob Crow.  Robert Crow, yes.  He's -- what's his title?  
25      The Director of Corporate Security.



1 Q. How about Ed Hazewski? It says Manager Diversion  
2 Control.

3 A. Correct.

4 Q. Do you know Ed Hazewski?

5 A. I do.

6 Q. Okay. What is Ed's role?

7 A. Ed's role was to oversee the Diversion Control Program.

8 Q. And what does diversion control mean?

9 A. Diversion control means the oversight of the customer  
10 due diligence and the order monitoring processes.

11 Q. And we'll talk about that a little bit later, OMP. OMP  
12 stands for order monitoring processing?

13 A. Program.

14 Q. Program? All right. Underneath Ed Hazewski is Kevin  
15 Kreutzer, DCP Specialist. Do you know Kevin Kreutzer?

16 A. I know Kevin, yes.

17 Q. Does he work under you?

18 A. He works under -- yeah, he works under me. He is wit  
19 -- still with the company.

20 COURT REPORTER: Still with the company, did you  
21 say?

22 THE WITNESS: Yes. I'm sorry.

23 BY MR. FARRELL:

24 Q. So, for nomenclature, is this a division, a department,  
25 a section? What do we call this CSRA?

1       **A.**    We would call it a department.

2       **Q.**    A department? Okay. So, Kevin Kreutzer works in your  
3 department?

4       **A.**    Correct.

5       **Q.**    Okay. What about Joe -- and I'm going to butcher this  
6 name.

7       **A.**    Tomkiewicz.

8       **Q.**    Tomkiewicz. Do you know Joe Tomkiewicz?

9       **A.**    I do.

10      **Q.**    Does he work in your department?

11      **A.**    He did at that time.

12      **Q.**    Okay. How about David Breitmeyer, does he work in your  
13 department?

14      **A.**    He did at that time.

15      **Q.**    Now, moving over here to the left side, it looks like  
16 from -- there are other -- at this point in time, in 2011,  
17 it looks like there are five direct reports to you; is that  
18 accurate?

19      **A.**    I count seven, eight.

20      **Q.**    Oh, I see. I apologize. You're right. Let's do this.  
21 Paul Ross, who is Paul Ross?

22      **A.**    Senior Director of Pharmacy and Specialty.

23      **Q.**    And what's his job?

24      **A.**    He is responsible for the other non-distribution  
25 businesses.

1 Q. So, I missed the line.

2 A. And then Nicole down there next to Ed Hazewski.

3 Q. And she's the Facilities Manager. What's that mean?

4 A. And for a brief time, Facilities Department reported up  
5 into my group, which is, you know, your office buildings and  
6 stuff like that.

7 Q. So, I'm going to change the color so we can see it, but  
8 it looks like from the drawing that Robert "Bob" Crow would  
9 report to you, correct?

10 A. At this point in time, yes.

11 Q. Bruce Gundy would report to you?

12 A. Yes.

13 Q. Paul Ross would report to you?

14 A. Yes.

15 Q. Steve Mays would report to you?

16 A. Yes.

17 Q. Mike Mapes would report to you?

18 A. As a consultant.

19 Q. As a consultant.

20 Ed Hazewski would report to you?

21 A. Yes.

22 Q. And Nicole Frost would report to you?

23 A. Correct.

24 Q. All right. I'm also going to identify a few other  
25 names that will be -- we'll be saying throughout. The next

1 is Eric Cherveney. Do you know Eric?

2 **A.** I do.

3 **Q.** Did I pronounce his name correctly?

4 **A.** Cherveney.

5 **Q.** Cherveney? Who is Eric Cherveney?

6 **A.** At that time, he looks like he was the Regional  
7 Director for the East Region.

8 **Q.** And what does that mean?

9 **A.** So, the drug distribution company is broken into  
10 several regions and each region has a Director of CSRA that  
11 oversees the operations at the individual distribution  
12 centers, which each has a manager, which are those yellow  
13 boxes that drop down, Compliance Managers, and then there's  
14 a subset of specialists and lead specialists underneath the  
15 managers at each of the distribution centers.

16 **Q.** So, in the blue, the blue would be a regional manager  
17 for a distribution center, correct?

18 **A.** For a region of distribution centers, not one  
19 distribution center.

20 **Q.** So, an East Region, there would be one, two, three,  
21 four, five, six distribution centers, correct?

22 **A.** Correct.

23 **Q.** And then -- so, Cathy Marcum is the North Region  
24 Director. Do you know Cathy Marcum?

25 **A.** I do.

1       **Q.** All right. And it looks like that Cathy is in charge  
2 of one, two, three, four, five, six, seven distribution  
3 centers; is that a fair conclusion?

4       **A.** That's -- those are the boxes under it at that time,  
5 yes.

6       **Q.** Now, I'm going to circle one particular name and that's  
7 Eric Martin. Do you know Eric Martin?

8       **A.** I do or did. He's no longer with the company, but yes.

9       **Q.** That's -- for some period of time, Eric Martin was  
10 employed by AmerisourceBergen?

11       **A.** Yes.

12       **Q.** He was in CSRA?

13       **A.** Yes.

14       **Q.** And he was the Distribution Center Manager for one of  
15 the distribution centers, agreed?

16       **A.** That's correct, at that time.

17       **Q.** And which distribution center, if you recall?

18       **A.** I don't. He moved. He was in several different ones.  
19 I don't know which one. That one, it doesn't have a name on  
20 it, but he was a Compliance Manager, and I believe he -- at  
21 that time, he was a Compliance Manager at one of the DCs.

22       **Q.** And so, does that mean he was the boss of the  
23 distribution center?

24       **A.** No. No, no. The CSRA is a completely separate  
25 function than the operational function of the distribution

1 center, specifically focused on regulatory and security  
2 issues, making sure divisions are doing what they need to  
3 do.

4 **Q.** So, there would be somebody in charge of a distribution  
5 center for operations?

6 **A.** You would have a district -- you would have a  
7 Distribution Center Manager that would be in charge of the  
8 entire operation, correct.

9 **Q.** And that would be outside of this chain of command?

10 **A.** Correct.

11 **Q.** And then, you would have somebody within your chain of  
12 command assigned to a distribution center in charge of CSRA?

13 **A.** Correct.

14 **Q.** And that would include making sure things don't get  
15 stolen, correct?

16 **A.** That's one.

17 **Q.** It would make sure you have a safe workplace?

18 **A.** Correct.

19 **Q.** And it would execute its duties to prevent diversion of  
20 controlled substances?

21 **A.** Correct. Make sure the divisions were following all  
22 the appropriate policies and procedures that you would find  
23 in the Code of Federal Regulations.

24 **Q.** I'm going to circle, I think, one more. That would be  
25 a Greg Madsen. Do you know who Greg is?

1       **A.**    Yes.

2       **Q.**    Who is Greg?  Who is Greg Madsen?

3       **A.**    Greg's the Regional Director at that time for the West  
4       Region.

5       **Q.**    All right.  So, to be clear, all of these people in  
6       your department, you're in charge of?

7       **A.**    In one way or another, yes.  They all roll up to me.

8       **Q.**    And you're responsible for their training?

9       **A.**    Yes.

10      **Q.**    You're responsible for them following guidelines and  
11      policies?

12      **A.**    Ultimately.

13      **Q.**    This is your department?

14      **A.**    It's my department.

15      **Q.**    And I believe I've caught all of the names that we're  
16      going to get to, but can we -- can we go to the very next  
17      slide please?

18             You know what I'm going to do is, I'm going to see, if  
19      I don't screw this up, I think I can save this.  You know  
20      what?  We'll come back to it if we can.

21             All right.  So, I believe this is the next iteration in  
22      my notes, and I won't hold you to it, sometime around 2015.  
23      And the only reason I bring it up is because there's a  
24      couple of new names that I want to identify so that we know  
25      who they are and I'm going to give you the privilege of

1 introducing one of the next witnesses and that would be  
2 David May. Do you know David May?

3 **A.** I do.

4 **Q.** And he's identified in this as the Senior Director  
5 Diversion Controls and Federal Investigations; is that  
6 right?

7 **A.** At that time period, correct.

8 **Q.** All right. So, was Mr. May hired by you?

9 **A.** Yes.

10 **Q.** Did you interview him?

11 **A.** I did.

12 **Q.** Did you think he was qualified?

13 **A.** I did.

14 **Q.** And why did you think he was qualified?

15 **A.** His experience. Based upon his experience and I  
16 figured he would fit our department well. It was a good  
17 hire.

18 **Q.** What experience did Mr. May have that you thought would  
19 fit well in CSRA at AmerisourceBergen?

20 **A.** He had -- he was a former DEA agent. He had a  
21 different -- a little bit different perspective on things  
22 than Mike Mapes that was on the diversion side of DEA that  
23 we used as a consultant in the past. And he had also had  
24 some complex investigation background in his history. So,  
25 he could handle -- had a multitude of skills, whether it's



1       investigatory or administratively in just handling large  
2       projects, as well, based upon his past experience.

3       **Q.**   And it looks like he's a direct report to you now,  
4       correct?

5       **A.**   Correct.

6       **Q.**   But it looks like that Mr. Steve Mays is still in the  
7       chain of command and he's also going to testify here today.  
8       Can you talk very briefly about the dual roles Steve Mays  
9       and David May play, how they interact?

10      **A.**   Today? Like current that time or the -- when this  
11      presentation was?

12      **Q.**   Well, to save some time, from a macro view, what -- was  
13      Steve Mays demoted?

14      **A.**   No.

15      **Q.**   Was David May inserted in the leadership command  
16      structure?

17      **A.**   He was -- yes.

18      **Q.**   And in what capacity was he inserted?

19      **A.**   He was inserted -- I'm looking at the org chart. So,  
20      he -- he took over the Diversion Control Program at that  
21      time. Steve Mays was Senior Director of Regulatory, as I  
22      explained, and was in charge of the distribution centers and  
23      the CSRA requirements. The Diversion Control Program is the  
24      Customer Due Diligence and Order Monitoring Program.  
25      Separate functions. There's an evolution to the timeline.

1 I mean, if you want me to --

2 **Q.** Absolutely.

3 **A.** So, in -- so, the evolution of the time frame is that  
4 we've always had -- CSRA always included our Code of Federal  
5 Regulations and our responsibility to prevent diversion. WE  
6 just didn't have it called Diversion Control Program. It  
7 was embedded into the --

8 **Q.** I'm going to interrupt you real quick only to give -- I  
9 promise I'm not going to be rude -- to ask you to slow down.

10 **A.** Oh, I'm sorry.

11 **Q.** Because the court reporter will like me more if you do.

12 **A.** Okay.

13 **Q.** So, starting over, what's the evolution of OMP?

14 **A.** Not evolution, but just -- you know, you're going  
15 through the org charts. I just wanted to make sure I didn't  
16 lose any contacts, right? So, the CSRA Group always was  
17 responsible for DEA Code of Federal Regulations  
18 responsibilities to have adequate --

19 COURT REPORTER: What was that? Adequate? What  
20 was it?

21 THE WITNESS: You did tell me to slow down.

22 Sorry. I don't remember. Apologize for that. What was the  
23 --

24 BY MR. FARRELL:

25 **Q.** Adequate controls to prevent --

1     **A.**    To prevent -- to prevent diversion under the Code of  
2     Federal Regulations. We just broke out a portion of those  
3     requirements in the Diversion Control Program at sometime,  
4     you know, 2007 forward.

5           Steve's been with the company for 45 years so, he's  
6     been dealing with those requirements for the last 45 years.  
7     The people that you'll see in senior -- in the director  
8     levels have also dealt with those policies and procedures  
9     for all of those years.

10          So, when we broke out the Diversion Control Group, at  
11     one point, Ed briefly reported to me, but also reported to  
12     Steve. And then, we decided to bring David in to take over  
13     the Diversion Control Program.

14          Steve still maintains the operational responsibilities  
15     that you see underneath in each of the distribution centers  
16     because they're a little bit different in responsibilities.  
17     The Diversion Control Program is more of a corporate  
18     function. It has tentacles into the -- unfortunately, the  
19     distribution isn't as simple as it seems, so they -- they do  
20     work closely -- all of those groups work closely with one  
21     another.

22     **Q.**    Let me see if I captured this right. You said  
23     diversion control is more of a corporate function?

24     **A.**    The Diversion Control Department, but diversion control  
25     is embedded in everything within CSRA. So, part of

1 diversion control for a distributor is having adequate  
2 security controls. So, you have to have cases involved  
3 within the distribution centers. Well, that's not the  
4 portion that's corporate. That's very specific to the  
5 distribution center and so that we make sure those  
6 requirements are followed by the -- the yellow boxes there  
7 at each of the distribution centers.

8 **Q.** Mr. Zimmerman, is there a difference between, in your  
9 mind organizationally, between Corporate Security and  
10 Regulatory Affairs? Is there a difference between the CS  
11 and the RA?

12 **A.** Over time, we've tried that, right, but we've just  
13 never -- they're intertwined. And when I started with the  
14 company 30 years ago, the department was called the Security  
15 Department and I was a Security Investigator during my first  
16 few years and I don't think regulatory got added to the  
17 title until the group -- even though we were performing DEA,  
18 Board of Pharmacy, those type of regulatory requirements way  
19 back then, most of those, we were just called the Security  
20 Department. So, they've always been closely intertwined.

21 **Q.** Before we get to the individual functions, I want to  
22 re-visit. Have the number of distribution centers operated  
23 by AmerisourceBergen involving controlled substances  
24 remained the same over the past 20 years?

25 **A.** Rough last 20 years, you say? Yes. At the time of the

1 merger, we had two companies coming together and there was a  
2 lot of divisions. I don't know, 55, however many. And  
3 then, over time, we consolidated them into -- where we had  
4 two in the same city, we would consolidate them. And then,  
5 it got down to the 25-30 has been a pretty good number over  
6 that time.

7 **Q.** So, today, how many distribution centers does  
8 AmerisourceBergen have?

9 **A.** I think they have 27.

10 **Q.** 27? And, in 2010, can you estimate or do you know how  
11 many distribution centers there were?

12 **A.** I would say it wouldn't be too far one way or another  
13 from that.

14 **Q.** All right. Are you familiar with the location of  
15 Huntington-Cabell County, West Virginia?

16 **A.** I -- I mean, it's in West Virginia, yeah.

17 **Q.** Have you ever been to Huntington-Cabell County, West  
18 Virginia?

19 **A.** I have not.

20 **Q.** You know you're in Charleston, Kanawha County, West  
21 Virginia?

22 **A.** Yes.

23 **Q.** Okay. So, do you know which of your distribution  
24 centers ship to pharmacies in Huntington-Cabell County, West  
25 Virginia?

1       **A.**    I believe it's Columbus Distribution Center and now we  
2       call it Lockbourne.  It's a newer facility.

3       **Q.**    Yes, sir.  Why do you call it Lockbourne?

4       **A.**    I think that's the city it's in.

5       **Q.**    And that's near Columbus?

6       **A.**    Yeah.  Must be a subsidiary, yeah.

7       **Q.**    And just for purposes of clarity, can you bring up  
8       44711\_28?

9               This is a chart that has been referenced on several  
10       occasions taken from the ARCOS data and it's simply -- this  
11       is 44711\_28.  This is the pie charts of the distribution  
12       centers.  There we go.

13              I'm going to represent to you that on the left-hand  
14       side here, you'll see AmerisourceBergen, and do you  
15       recognize what I just circled there?

16       **A.**    Yes.

17       **Q.**    What is that?

18       **A.**    Our logo -- or was our logo.  Not any longer.

19       **Q.**    Like, but literally, what is it?

20       **A.**    What is the logo?

21       **Q.**    Yes.

22       **A.**    So, at the time of the merger, they came up with -- I  
23       was with Bergen Brunswig, Amerisource, they combined the  
24       names and they -- the story behind the logo is that is like  
25       the -- a sail, but each of those lines are all coming

1 together as one at the bottom. You know, I don't -- I'm not  
2 -- I'm not a marketing person. I'm a -- that's the purpose  
3 of it.

4 **Q.** E pluribus unum, out of many come one?

5 **A.** Yeah, I guess.

6 **Q.** So, in this distribution pie chart, it has identified  
7 what looks to be 98% of the pills coming from Lockbourne,  
8 Ohio Distribution Center. Does that sound about right based  
9 on your knowledge of geography?

10 **A.** I know they've distributed the majority. I don't --  
11 you know, I don't know if it's 98, or 95, or 100.

12 **Q.** Do you have a number of -- currently, how many people  
13 do you supervise in CSRA?

14 **A.** Direct reports or within the department?

15 **Q.** Both.

16 **A.** My direct reports just changed a little bit, so it's  
17 probably -- I think it's eight right now.

18 **Q.** And how many of -- how many employees? How many staff  
19 members?

20 **A.** I believe we're about around 150.

21 **Q.** All right, Doc -- or, Mr. Zimmerman, I've got a couple  
22 of follow-up questions for you. Let's talk about the  
23 function of CSRA. You would agree with me that  
24 AmerisourceBergen is responsible for maintaining effective  
25 control to prevent diversion?

1       **A.**     Right. Well, products under our care, correct.

2               COURT REPORTER: I'm sorry. What was that?

3               THE WITNESS: When products are under our control,  
4     that's correct. That's our responsibility.

5       **Q.**     We'll put a pin in that. I promise we'll come back to  
6     that.

7       **A.**     Okay.

8       **Q.**     In general, will you agree with me that  
9     AmerisourceBergen is responsible for maintaining effective  
10    control to prevent diversion of controlled substances?

11    **A.**     While under our DEA registration, correct.

12    **Q.**     While under your DEA registration?

13    **A.**     Correct.

14    **Q.**     What does that mean?

15    **A.**     So, the way the closed system works in the DEA is they  
16    designed it that each element is responsible for their  
17    adequate controls diversion and their own security and  
18    safety and record keeping requirements based upon their  
19    categories. The manufacturers have their own requirements.  
20    Distributors have their own requirements. Pharmacies have  
21    their own requirements. And prescribers have requirements  
22    that they have to have a DEA license.

23            So, while -- to practice under your DEA license, you  
24    have to have adequate security controls. You have to have  
25    inventory controls. There's reporting processes that you're



1 required to perform.

2 Whether it's inventory or loss reporting, destruction  
3 reporting; and then, there's also suspicious order reporting  
4 requirement. And, lastly, you need to make sure that the  
5 customer you sell to, you make a good faith effort they have  
6 a license to take possession of the product.

7 Once they sign for that product then, their  
8 registration takes over the adequate controls to prevent  
9 diversion. So, the pharmacy must have similar-type  
10 processes and requirements in place to protect the drugs.

11 **Q.** I'm going to try to distill down exactly where perhaps  
12 you and I are going to diverge this afternoon.

13 **A.** Okay.

14 MR. NICHOLAS: Your Honor, I will object to the --  
15 that kind of commentary.

16 THE COURT: Sustained.

17 MR. FARRELL: I apologize.

18 BY MR. FARRELL:

19 **Q.** In the closed chain of distribution, you have  
20 manufacturers, correct?

21 **A.** Correct.

22 **Q.** They're the ones that make the pills, agreed?

23 **A.** They make the pill -- if you're talking about -- are we  
24 going to talk about controlled substance? I mean, it --  
25 there's different requirements depending on what type of

1 products you're handling. And so, as a distributor, we  
2 handle all classes of trade, prescription controls, opioids.  
3 So, if you're a controlled substance manufacturer, just so  
4 I'm clear --

5 **Q.** I appreciate clarity. For purposes of this next hour  
6 or so, we're going to be talking about controlled  
7 substances. You're familiar with controlled substances?

8 **A.** Yes.

9 **Q.** And controlled substances include narcotics?

10 **A.** Correct.

11 **Q.** And they include Schedule II narcotics made from opium?

12 **A.** They -- yes.

13 **Q.** And that includes hydrocodone and oxycodone?

14 **A.** Hydrocodone now -- I mean, it's been rescheduled to a  
15 II, but previously it was a III, right.

16 **Q.** So, today, hydrocodone opiate pills and oxycodone  
17 opiate pills are Schedule II narcotics regulated by the  
18 Controlled Substances Act?

19 **A.** That's correct.

20 **Q.** There was a period of time where hydrocodone pills  
21 called HCP, or hydrocodone combination products, were  
22 Schedule III?

23 **A.** Correct.

24 **Q.** Okay. So, Schedule II controlled substances are  
25 defined in the Controlled Substances Act as substances with

1 a high potential for abuse; agreed?

2 **A.** That's how the scheduling system works, I agree.

3 **Q.** I'm asking you, the Controlled Substances Act, the  
4 pills, the opiate pills that AmerisourceBergen is selling,  
5 are pills that have a high potential for abuse; agreed?

6 **A.** The Schedule II drugs have a -- are a Schedule II  
7 because of their high potential for abuse and we sell them,  
8 correct.

9 **Q.** And that these pills have severe restrictions on them  
10 according to the Controlled Substances Act?

11 **A.** I'm not sure what restrictions you're referring to.  
12 The regulations that are established in the Code of Federal  
13 Regulations based upon the Act?

14 **Q.** I'll read it to you. Under -- this is under Section  
15 812(b)(2)(a), and it says that if you're a Schedule II drug,  
16 the drug or other substance has a high potential for abuse.  
17 You agree with that?

18 **A.** Yes.

19 **Q.** The second section, (b), says, "The drug or other  
20 substance has a currently accepted medical use in treatment  
21 in the United States or a currently accepted medical use  
22 with severe restrictions." You agree with that?

23 **A.** If that's what it says. I mean, I'm not familiar with  
24 what you're reading from, but -- I mean, you're reading from  
25 the Controlled Substances Act, but I don't know if that's

1 exactly what it says, but --

2 **Q.** If I've read it accurately, that's what it says?

3 **A.** Yes.

4 **Q.** And then (c) says that, "Abuse of a Schedule II drug  
5 may lead to severe psychological and physical dependence."  
6 You agree with that?

7 **MR. NICHOLAS:** Your Honor, I will only object  
8 because if the witness is going to be asked if that's what  
9 it says, then I think he ought to be shown the document.

10 **THE COURT:** Well, how about that, Mr. Farrell?

11 **MR. FARRELL:** I think you would probably enjoy him  
12 reading it as much as you enjoy hearing me read it.

13 **THE COURT:** Well, show it to him.

14 **MR. FARRELL:** Okay.

15 **BY MR. FARRELL:**

16 **Q.** Under the Controlled Substances Act, are you aware of  
17 the purpose of scheduling these drugs?

18 **A.** Yes.

19 **Q.** Okay. Do you have it memorized?

20 **A.** No. I --

21 **Q.** Would you like to see it?

22 **A.** I don't have -- you asked if I had it memorized.

23 **Q.** Yes. Do you know what the Controlled Substances Act  
24 says is the purpose for enacting these laws?

25 **A.** No.

1 Q. Okay.

2 MR. FARRELL: Judge, may I approach?

3 THE COURT: Yes.

4 BY MR. FARRELL:

5 Q. I'm going to show you what is marked 801 and will you  
6 read for the record what the title is?

7 A. You want me to read?

8 Q. The title of 801, bottom left-hand corner.

9 A. "Congressional findings and declarations of controlled  
10 substances."

11 Q. And you see where I've highlighted Section I? Or I've  
12 highlighted Section II. I'll have you read Section I aloud,  
13 please.

14 A. "Any of the drugs included within this sub-chapter have  
15 a useful and legitimate medical purpose and are necessary to  
16 maintain the health and general welfare of American people."

17 Q. Do you agree with that?

18 A. I do.

19 Q. What about Paragraph 2, will you read that, please?

20 A. "The illegal importation, manufacturing, distribution"  
21 --

22 COURT REPORTER: I'm sorry. Can you slow down for  
23 me, please?

24 THE WITNESS: "The illegal importation,  
25 manufacturing, distribution and possession and improper use

1 of controlled substances have a substantial and detrimental  
2 effect on the health and general welfare of American  
3 people."

4 BY MR. FARRELL:

5 **Q.** Mr. Zimmerman, do you agree with that statement?

6 **A.** Yes.

7 **Q.** Thank you. Mr. Zimmerman, do you agree with me that  
8 the Controlled Substances Act, the law, the statute passed  
9 by Congress in the Code of Federal Regulations where  
10 Congress authorized the DEA to promulgate rules, these are  
11 intended to close the system of distribution?

12 **A.** Correct.

13 **Q.** And the purpose of closing the system of distribution  
14 is to prevent diversion?

15 **A.** Correct.

16 **Q.** And so, under this closed system that I'm going to  
17 draw, the manufacturer of prescription opiates sells the  
18 pills to the distributors, agreed?

19 **A.** Correct.

20 **Q.** And AmerisourceBergen, the party you are identified  
21 with, is one of the distributors that purchases Schedule II  
22 prescription opiates for sale to pharmacies across America?

23 **A.** Correct. One of the items we purchased was opioids,  
24 correct.

25 **Q.** Another one of the distributors is McKesson, who is

1 also here. You're aware of that?

2 **A.** Yes.

3 **Q.** And another one is Cardinal Health? You're aware of  
4 that?

5 **A.** Yes.

6 **Q.** Between the three of the companies, do you sometimes  
7 refer to yourself internally as The Big Three?

8 **A.** It's referenced as The Big Three.

9 **Q.** How much of a market share does The Big Three hold  
10 nationally?

11 **A.** I've heard upwards of 90%, but I don't know if that  
12 still holds true today.

13 **Q.** All right. Now, from the distributors you sell to  
14 pharmacies, correct?

15 **A.** Correct.

16 **Q.** And so, the patient has to go and take -- go to a  
17 pharmacy to get these drugs; agreed?

18 **A.** Correct.

19 **Q.** And when I say "these drugs", I'm talking about  
20 prescription opiates. They're only legally sold through  
21 pharmacies.

22 MR. NICHOLAS: Objection.

23 THE COURT: What's the basis?

24 MR. NICHOLAS: I don't think it's an accurate  
25 statement.

1 THE WITNESS: I mean, they're sold in -- I mean --

2 THE COURT: I'll let him answer if he knows.

3 MR. FARRELL: Your Honor, I will allow Mr.

4 Nicholas to --

5 MR. NICHOLAS: I'll withdraw it. I'll withdraw.

6 THE COURT: We don't need the smart-aleck remarks,  
7 Mr. Farrell, and you can stop that right now.

8 MR. NICHOLAS: I'll withdraw the objection.

9 THE WITNESS: I was just going to say, we also  
10 sell to hospitals in addition to -- I mean, you said they're  
11 only sold to pharmacies, but we also sell opioids to  
12 hospitals, as well.

13 BY MR. FARRELL:

14 Q. All right. And so, you have to have a prescription  
15 from a medical doctor; agreed?

16 A. That's correct.

17 Q. All right. So, it's your position that the duties  
18 imposed upon AmerisourceBergen are while the pills are in  
19 your possession and end when you drop them off at the  
20 pharmacy?

21 A. Correct.

22 Q. You don't believe you have any responsibility to  
23 prevent diversion after you drop the pills off at the  
24 pharmacy?

25 A. The closed -- I have no control over what happens -- so



1 the way the closed -- and let's just talk about the  
2 recordkeeping requirements. If there's diversion in the  
3 pipeline, the way the -- the way the CFR is written, they  
4 can go to the manufacturer and the manufacturer says they  
5 manufactured a thousand pills and I sold a thousand pills.  
6 No diversion. They go to our -- we get audited every year,  
7 multiple times a year, and they come to our warehouse and  
8 say show me all the opioids you bought. They minus how much  
9 we sold. They count the shelf and determine if any  
10 diversion occurred while it's under our control.

11 They go to the pharmacy who has a DEA registration and  
12 they can say how many drugs did -- how many opioids did you  
13 get from the distributor? How many prescriptions did you  
14 fill? And if it doesn't match, there could be diversion.

15 And so, you're asking me can I be responsible for a  
16 pharmacy's recordkeeping requirements? We don't. We don't.  
17 We don't -- that's why they issue a pharmacy a separate DEA  
18 registration and that's why they have the authority to  
19 revoke a registration or whatever action they can, is  
20 because the diversion occurred under that registration.

21 If the diversion occurs under the distributor's  
22 registration, they have the authority to take action against  
23 our -- our registration.

24 **Q.** So, to be clear, your position on behalf of  
25 AmerisourceBergen is that your duty is to receive

1 prescription opiates that you purchased from the  
2 manufacturers and provide security for those until they're  
3 delivered to the pharmacy and to ensure the pharmacy has a  
4 DEA registration?

5 **A.** Our responsibility is, right, to keep -- receive those  
6 drugs, safeguard them as outlined in the Code of Federal  
7 Regulations to ensure no diversion occurs and then make them  
8 available for pharmacies to order.

9 We also need to make sure that the pharmacies have an  
10 appropriate license, that they submit the appropriate forms.  
11 So, with a narcotic, it requires a narcotic order form or a  
12 blank and we're required to make sure we get that  
13 information, but the product doesn't leave until we are  
14 satisfied.

15 **Q.** So, the answer to my question is yes, you believe from  
16 AmerisourceBergen's perspective, that your duty or  
17 responsibility ends once you drop off the pills to a  
18 licensed DEA registrant pharmacy?

19 **A.** Our duty for diversion -- right. Correct. Our  
20 responsibility to prevent diversion occurs under our  
21 registration, correct.

22 **Q.** Do you believe that the DEA has a duty -- or, I'm  
23 sorry, that ABC has a duty to maintain effective control  
24 when considering the entire chain of distribution?

25 **A.** I have no control over the manufacturer. I can't --

1 you're imposing that we have a duty that they have effective  
2 control as to how they box the product at the manufacturing  
3 site. That's impossible. I -- we -- that's not how the --  
4 that's not how the system was designed.

5 **Q.** So, let's take the manufacturers and let's remove them.  
6 Let's just take once the pills get to you safely and  
7 securely.

8 **A.** Correct.

9 **Q.** Do you have a duty to block shipment of suspicious  
10 orders to pharmacies?

11 **A.** We have a duty to design and operate a system that  
12 identifies suspicious orders and then we have a duty to  
13 report those to the DEA.

14 **Q.** So, the answer to my question is yes or no? Do you  
15 have a duty to block suspicious orders to pharmacies?

16 **A.** We -- we have a -- agreement that we won't ship orders  
17 that we deem to be suspicious to pharmacies.

18 **Q.** Mr. Zimmerman, you are aware that you testified  
19 previously in this case, in the opioid litigation; do you  
20 recall that?

21 **A.** If I testified or I --

22 **Q.** You gave a deposition?

23 **A.** Yes, correct.

24 **Q.** In 2018?

25 **A.** Uh-huh.

1       **Q.**   And you testified in your individual capacity and you  
2       also testified as the 30(b)(6) deponent, did you not?

3       **A.**   I have, yes. I'm not sure what one you're referencing,  
4       but yes.

5       **Q.**   I'm talking about the deposition that was taken in the  
6       MDL 2804 related to this opiate litigation. A 30(b)(6)  
7       notice was served on ABC. Are you aware of that?

8       **A.**   Yes.

9       **Q.**   Do you know what a 30(b)(6) is?

10      **A.**   I'm representing the company, yes.

11      **Q.**   And so, you were speaking on behalf of the -- of  
12      AmerisourceBergen when you testified under oath in this  
13      case?

14      **A.**   For the 30(b)(6)?

15      **Q.**   Yes.

16      **A.**   Yes.

17      **Q.**   And you are asked whether or not AmerisourceBergen has  
18      a duty to prevent diversion and your answer was no; do you  
19      recall that?

20      **A.**   No.

21      **Q.**   Let me pull up Clip 1.

22           (Recording played in open court)

23           BY MR. FARRELL:

24      **Q.**   So, you -- your position officially on behalf of  
25      AmerisourceBergen is you have no duty to maintain effective

1 controls as imposed under federal regulatory law?

2 MR. NICHOLAS: Your Honor, I'll object to the --  
3 I'll object to the questioning that included a deposition  
4 snippet that was not inconsistent with his testimony.

5 THE COURT: I'll sustain the objection.

6 BY MR. FARRELL:

7 Q. All right. So, how about the duty not to ship, do you  
8 believe you have a duty not to ship?

9 A. I have -- we have an agreement not to ship.

10 Q. Sir, do you have a duty to block shipments of  
11 prescription opiates?

12 MR. NICHOLAS: Objection, asked and answered.

13 THE COURT: Sustained.

14 MR. FARRELL: Well, Your Honor, if he's answered  
15 it, I don't recall what his answer is.

16 THE COURT: Well, you're arguing with him. He's  
17 answered your question. You didn't get the answer you  
18 wanted. Let's move on.

19 BY MR. FARRELL:

20 Q. All right. So, you previously testified that  
21 AmerisourceBergen as a company does not have a duty to block  
22 shipments; agreed?

23 A. If you're referring to that video, we are talking about  
24 the word duty, not whether -- and it was a discussion -- it  
25 was a long discussion about that and -- as I remember it

1 from three years ago.

2 **Q.** So, we're moving past the duty to maintain effective  
3 control. We're now talking about the duty to block -- to  
4 block suspicious orders. That's a separate topic. Do you  
5 recall testifying about that?

6 MR. NICHOLAS: I'll object to the -- I'll object  
7 to the question as just confusing and I think at this point  
8 -- I just think it's very confusing.

9 THE COURT: I'll sustain the objection.

10 BY MR. FARRELL:

11 **Q.** So let me start over. Is the official position of  
12 AmerisourceBergen that it has a duty to block shipment of  
13 suspicious orders?

14 MR. NICHOLAS: Objection, asked and answered.

15 THE COURT: Sustained.

16 MR. FARRELL: Well, Judge, can I impeach him with  
17 the testimony from his previous deposition?

18 THE COURT: You just did, didn't you?

19 MR. FARRELL: This is a second topic. This is the  
20 duty to block shipment.

21 THE COURT: Well, if he testified inconsistently  
22 with what he just said, you may impeach him.

23 MR. FARRELL: Yes, sir.

24 Can you play video clip 2, please?

25 (Recording played in open court)

1 BY MR. FARRELL:

2 Q. So, that's 2018. You were unfamiliar with the shipping  
3 requirement from the Masters Pharmaceutical case; agreed?

4 MR. NICHOLAS: I'll object to the question. I  
5 don't believe that the testimony that was shown was  
6 inconsistent with his testimony.

7 THE COURT: Sustained. I don't think it was  
8 either.

9 BY MR. FARRELL:

10 Q. Mr. Zimmerman, have you gone back to look at -- look  
11 backwards and to determine the -- AmerisourceBergen's role  
12 in shipping suspicious orders or otherwise into  
13 Huntington-Cabell County?

14 A. Our department has looked at -- have I personally?

15 Q. Yes.

16 A. No.

17 Q. All right. You're aware that this case has been  
18 pending for four years?

19 A. I don't -- okay. I don't know that for sure, but if  
20 you're saying that, then I don't have any reason to not know  
21 that or I don't -- I don't know how long it's been. Let me  
22 answer it that way.

23 Q. You understand that there are a number of counties and  
24 cities across America that have filed lawsuits?

25 A. Yes.

1       **Q.**   And you've testified on behalf of AmerisourceBergen in  
2       that case?

3       **A.**   Yes.

4       **Q.**   Okay.

5       **A.**   And -- yes.

6       **Q.**   Have you read any of the other deposition transcripts  
7       from this case?

8       **A.**   Mine or other people's or --

9       **Q.**   Any of the other ones?

10      **A.**   No.

11      **Q.**   Have you gone back and read the discovery responses  
12      from AmerisourceBergen regarding the Suspicious Order  
13      Policy?

14      **A.**   I have not.

15      **Q.**   Have you read any of the deposition transcripts from  
16      the people from Huntington and Cabell County that have been  
17      deposed by AmerisourceBergen in this case?

18      **A.**   I have not.

19      **Q.**   You have complained in the past that the DEA has not  
20      done a very effective job of communicating with you at  
21      AmerisourceBergen about your duties under federal  
22      regulations; agreed?

23      **A.**   I wouldn't characterize it that way. I would state  
24      that I had wished that the communications were better with  
25      DEA.



1       **Q.**     Why is that?

2       **A.**     When I started with the company 30 years ago, we had a  
3       great working relationship with the DEA. We worked together  
4       on a lot of different issues when I first started. Steroids  
5       was the big thing, roid rage. We worked with DEA. They  
6       made it a Schedule III and we were able to -- you know, that  
7       was very positive movement.

8             The Methamphetamine Control Act was another one. I  
9       worked with DEA giving them Pseudoephedrine Sales Reports  
10      years in advance so they could see where they had pockets of  
11      areas. Since pseudoephedrine tablets were an  
12      over-the-counter drug, DEA had no access to that  
13      information, so we cooperated with them to then help launch  
14      into the Methamphetamine Control Act that passed that had a  
15      big impact on the methamphetamine problem in the U. S.

16            We've worked with them on other issues, whether it's  
17      train their DEA officers or diversion investigators to help  
18      them understand the distribution network. We've worked with  
19      them on that.

20            They had an issue with Methadone in hospitals causing  
21      overdose. They had us come down and asked if we could  
22      voluntarily stop selling Methadone diskettes to pharmacies,  
23      which all the distributors agreed upon and we were able to  
24      resolve that.

25            So, when we worked together, we were able to resolve

1 issues. Over the years, opioid crisis happens, and it just  
2 seems like there's been a breakdown. The crisis continues.  
3 No communication. No resolution. So, it's frustrating.

4 **Q.** So, in fact, you served on the 1998 Attorney General  
5 Methamphetamine Act Panel, correct?

6 **A.** The wholesalers were only given one member and I wasn't  
7 that one. I worked with them, but I wasn't the one. I  
8 think I was -- I was -- they had a more senior person at the  
9 time in the 90s than I, but I sat in on the meetings and  
10 participated.

11 **Q.** We call that the Reno Report colloquy. Do you know  
12 what that means?

13 **A.** Yeah. Janet Reno was leading it up.

14 **Q.** And you've testified about that before. You're  
15 familiar with the Reno Report?

16 **A.** I -- I don't know if I've seen it for decades, but  
17 yeah.

18 **Q.** All right. So, you're aware that, in this case, the  
19 DEA has been deposed several times?

20 **A.** I'm not aware of that.

21 **Q.** Did you know that the DEA actually put up a 30(b)(6)  
22 witness over a three-day period by the name of Thomas  
23 Prevosnik?

24 **A.** If you're -- if you're telling me that, yes. I know  
25 Tom, but --

1       **Q.**    Have you read the deposition transcript of Thomas  
2       Prevosnick to learn what the DEA says about the opioid  
3       epidemic?

4               MR. NICHOLAS:   Your Honor, I will object.   I'm  
5       trying not to object too often, but he said he doesn't know  
6       anything about any other depositions and said he didn't read  
7       anything, didn't know any DEA people were deposed.   So, I  
8       don't think this line of questioning is fruitful and I think  
9       it's irrelevant.

10              THE COURT:   Have you read the deposition  
11       transcript of Thomas Prevosnik?

12              THE WITNESS:   I have not.

13              THE COURT:   I'll sustain the objection.

14              BY MR. FARRELL:

15       **Q.**    All right.   Have you read the deposition transcript of  
16       any of the other DEA agents, including Joe Rannazzisi,  
17       Demetra Ashley, Laurie Costello (phonetic), Stacy  
18       Harper-Avilla, June Howard, Michael Mapes, Keith Martin,  
19       Matt Strait, Don Tush, or Kyle Wright?

20       **A.**    I have not.

21       **Q.**    Have you read the complaint that was filed in this  
22       matter?

23              THE COURT:   I think the court reporter needs a  
24       break, Mr. Farrell.   Let's -- it's quarter after 3:00.  
25       Let's be in recess until 3:30.

1 (Recess taken)

2 THE COURT: Mr. Zimmerman, you're still under oath  
3 of course, sir. You may resume the witness stand.

4 THE WITNESS: Thank you.

5 THE COURT: Go ahead, Mr. Farrell.

6 BY MR. FARRELL:

7 Q. Mr. Zimmerman, you're familiar with the controlled  
8 substance ratio and the function it was used for by  
9 CSRA?

10 A. I'm not sure exactly what you're referring to.

11 Q. When looking for suspicious orders, does CSRA look to  
12 the percentage of product sold to a pharmacy compared to  
13 controlled substances?

14 A. It's one of the many elements that they, they consider.

15 Q. So the answer is, yes, it's a component?

16 A. Yes.

17 Q. Okay. Would you agree with me that the average retail  
18 pharmacy purchases between 5 and 15 percent of controlled  
19 substances from your distribution centers?

20 A. I, I'm not sure what the average is from our  
21 distribution centers, but I've seen reference to 10, 12, 15.

22 Q. I've got a couple questions for you in general about  
23 the opioid epidemic.

24 Mr. Zimmerman, do you acknowledge that there presently  
25 exists an opioid epidemic in the United States?

1       **A.**    Yes.

2       **Q.**    Do you acknowledge there presently exists an opioid  
3       epidemic in the State of West Virginia?

4       **A.**    Yes.

5       **Q.**    Do you acknowledge there presently exists an opioid  
6       epidemic in Huntington, Cabell County?

7       **A.**    I -- again, I don't know that specific, but I know West  
8       Virginia for sure, yes.

9       **Q.**    You're unfamiliar with the circumstances of the opioid  
10       epidemic within Huntington/Cabell County?

11       **A.**    There's an opiate epidemic in West Virginia. I'm not  
12       sure if you want me to say city but city or --

13       **Q.**    Well, I'm referencing the plaintiffs in this case.

14       **A.**    Yes.

15       **Q.**    The city -- sorry. The City of Huntington and Cabell  
16       County, do you acknowledge there's an opioid epidemic within  
17       the city and county?

18       **A.**    Yes.

19       **Q.**    Do you acknowledge that the opioid epidemic has had a  
20       devastating impact on public health and public safety?

21       **A.**    I believe so.

22       **Q.**    Do you acknowledge the opioid epidemic involves opioid  
23       use and abuse?

24       **A.**    Yes.

25       **Q.**    Do you acknowledge the opioid epidemic involves

1 morbidity?

2 **A.** Death?

3 MR. NICHOLAS: I'll object to that. I'm not sure  
4 what is meant by that.

5 THE COURT: Yeah. What do you mean by morbidity,  
6 Mr. Farrell, in this context?

7 BY MR. FARRELL:

8 **Q.** Mr. Zimmerman, do you know what morbidity means?

9 **A.** I was going to ask you. Are you referring to death?

10 **Q.** That would be mortality. I'm asking you if you know  
11 whether morbidity or impact to a person's health.

12 **A.** I'm not still understanding the, your question.

13 **Q.** Do you believe the opioid epidemic has had adverse  
14 impacts on individuals' well-being, physical well-being in  
15 Huntington, Cabell County, West Virginia?

16 **A.** That were, that were addicted? Is that your question?

17 **Q.** I'm asking you whether or not you believe the opioid  
18 epidemic has had an adverse effect on the physical  
19 well-being of human beings that live in Huntington and  
20 Cabell County, West Virginia.

21 **A.** It would have an effect, yes.

22 **Q.** Do you believe the opioid epidemic has had -- involves  
23 more -- let me strike that and start over. Do you believe  
24 the opioid epidemic involves mortality in Huntington, Cabell  
25 County, West Virginia?

1       **A.**     Yes.

2       **Q.**     Do you acknowledge that the DEA has warned  
3       AmerisourceBergen about the risks of selling too many pills  
4       of prescription opiates into communities?

5               MR. NICHOLAS:  Objection for lack of foundation.

6               THE COURT:  Yeah.  I'll sustain the objection.

7               You can go at it another way, Mr. Farrell, if you can.

8       But --

9       BY MR. FARRELL:

10      **Q.**     Are you aware of whether or not the DEA has warned  
11      AmerisourceBergen of the risks of selling too many  
12      prescription opiates into communities?

13              MR. NICHOLAS:  Same objection.

14              THE COURT:  Well, if he knows.

15              THE WITNESS:  I'm not sure of the con- -- I'm not  
16      sure of the context of your question.

17      BY MR. FARRELL:

18      **Q.**     It's fair.  We'll come back to that shortly.

19              Has the DEA sanctioned AmerisourceBergen for failing to  
20      maintain effective control to prevent diversion of  
21      prescription opioids?

22      **A.**     I'm not sure how to answer that.  We have entered into  
23      an agreement with DEA, but there's no guilt identified.  I'm  
24      not sure how to answer your question.

25      **Q.**     Did the agreement include a sanction?

1 MR. NICHOLAS: Object to the form.

2 THE COURT: Overruled. You can answer.

3 THE WITNESS: What do you mean by sanction?

4 BY MR. FARRELL:

5 Q. Do you know what a sanction is?

6 A. No. I'm not sure what -- if you could just tell me  
7 what you -- I just want to make sure I answer, answer your  
8 question correctly.

9 Q. Mr. Zimmerman, to be fair, I'm not going to -- I'm  
10 going to show you the documents. I'm just trying to  
11 understand before we start on the documents what your  
12 general understanding is.

13 You're aware AmerisourceBergen -- in fact, you  
14 personally negotiated an agreement with the DEA back in  
15 2007?

16 A. Yes, correct.

17 Q. And as part of that agreement, your distribution center  
18 got its license reinstated. Agreed?

19 A. Correct.

20 Q. And you got the license reinstated when two things  
21 happened. Number one is you agreed to modify how you were  
22 reporting suspicious orders. Agreed?

23 A. Fair.

24 Q. Instead of reporting the suspicious orders like  
25 everybody else in the country to the local distribution



1 center, AmerisourceBergen was required to report suspicious  
2 orders to headquarters?

3 **A.** That was one element, uh-huh.

4 **Q.** That's a change -- that's different than what anybody  
5 else was doing; correct?

6 **A.** Correct.

7 **Q.** In addition to that, AmerisourceBergen made promises or  
8 pledges to implement new policies and procedures. Agreed?

9 **A.** We changed our processes and procedures, yes.

10 **Q.** Mr. Zimmerman, I didn't ask you if you changed them.  
11 I'm asking you whether or not as part of your negotiations  
12 with the Drug Enforcement Agency following the Immediate  
13 Suspension Order you entered into an agreement, you  
14 negotiated a deal to get your license back by making  
15 promises that you would make changes?

16 **A.** Correct.

17 **Q.** Do you acknowledge that the more prescription opioid  
18 pills that you sell into the community, the more likely  
19 diversion is to take place?

20 **A.** I, I don't know that. I mean, we sell, we sell to  
21 licensed pharmacies. Right? And then the amount of product  
22 that goes to those pharmacies because they receive more,  
23 does that mean they're more susceptible to diversion? I  
24 guess they could be.

25 **Q.** Is that a factor you take into account as CSRA?

1       **A.**    The size of the pharmacy?

2       **Q.**    Size of the volume of shipments.

3       **A.**    We look at that, yes.

4       **Q.**    So the reason that you're looking at it is what?

5       **A.**    We're looking for anything that would raise our  
6       suspicion of -- totality of, of items that we look at. I  
7       mean, there's all sorts of things that we take a look at.

8       **Q.**    You're looking for suspicion of what?

9       **A.**    Could be a potential suspicious order.

10      **Q.**    And it's suspicious why?

11      **A.**    It could be -- you know, the Code of Federal  
12      Regulations says it could be quantity, pattern, or frequency  
13      is the way it's stated in the CFR. But we're looking at  
14      anything that we feel to be -- makes it a suspicious order.

15      **Q.**    Suspicious --

16      **A.**    The totality of the circumstances.

17      **Q.**    Suspicious of what? What is it that you're suspicious  
18      of?

19      **A.**    We're suspicious it's a larger order going to a  
20      pharmacy and we don't have -- we just don't feel comfortable  
21      about shipping that product.

22      **Q.**    Why is that a bad thing?

23      **A.**    It's just the process that we, that we operate under.  
24      We have no specific information on the patient or the  
25      prescriber or those individuals. So we have to go with the

1 information that we have. If they're a licensed pharmacy,  
2 we report those orders to DEA. And then we have an  
3 obligation to review orders to see if there's again -- that  
4 we identify as suspicious but report to the DEA.

5 **Q.** Mr. Zimmerman, I think we're talking past each other.

6 **A.** Okay. Sorry.

7 **Q.** You're suspicious that it's too, too big? Are you  
8 suspicious that the pills are being -- what? Help me  
9 understand what you're suspicious of. Why are suspicious  
10 orders bad?

11 MR. NICHOLAS: I'll object to the -- I'll object  
12 to the question.

13 THE COURT: On what basis?

14 MR. NICHOLAS: It's, it's confusing and it's  
15 vague. It's just not specific enough.

16 THE COURT: Well, I'll overrule the objection.

17 Can you explain why suspicious orders are bad, if they  
18 are?

19 THE WITNESS: I don't know they're bad. They're  
20 suspicious. That's the purpose of -- that's the purpose of  
21 reporting them. Pharmacies are licensed and they fill  
22 prescriptions. We believe that the DEA, the Board of  
23 Pharmacy would not issue a registration to a pharmacy that  
24 wasn't meeting the requirements.

25 If we have an order that we feel may be suspicious just

1 because it seems suspicious doesn't mean it's bad. We  
2 report it to the DEA and all issues, then the DEA would then  
3 investigate. If your concept is all suspicious orders are  
4 bad, then DEA should be taking action on every single  
5 suspicious order reported. And I, I'm not sure if I can  
6 recall one.

7 So I'm just -- I don't know if I can say that a  
8 suspicious order is bad. Suspicious orders are suspicious.  
9 That's the reason they put it in the Code of Federal  
10 Regulations so we had a mechanism to alert DEA of the  
11 potential suspicion that if they had other information at  
12 their disposal, they can investigate and take action on the  
13 pharmacy to see if there's diversion occurring at the  
14 pharmacy. That's the whole purpose of the suspicious order,  
15 not that -- it doesn't say report bad orders. It says  
16 report suspicious orders. So I can't make that nexus.

17 BY MR. FARRELL:

18 **Q.** So I guess my question to you, Mr. Zimmerman, to be  
19 more direct, is that what you're suspicious of is that  
20 the prescription opiates are getting diverted into the  
21 illicit market. Would you agree with that?

22 **A.** Well, what's suspicious of the -- whatever made it  
23 suspicious on the totality of the review of the order of why  
24 the investigator decided to report it to DEA is that they  
25 just didn't feel comfortable releasing that order and they

1 would report to DEA.

2 And, again, the way the system works is the DEA has a  
3 lot more information. They see who that pharmacy is buying  
4 from in addition to AmerisourceBergen. They have records --  
5 they have investigative techniques at their disposal which  
6 we don't have. And we're, we're a company. We're not an  
7 enforcement agency and we're not a regulatory agency.

8 Our regulatory requirement is to report a suspicious  
9 order so then the authorities that have that jurisdiction  
10 can then conduct that part. And if there are bad actors,  
11 then they can revoke the license and that tells us not to  
12 ship to them anymore.

13 **Q.** Let's try this a different way.

14 Can you, can you bring up the five questions?

15 **MR. FARRELL:** Judge, may I approach the screen?

16 **THE COURT:** Yes.

17 **BY MR. FARRELL:**

18 **Q.** I'm going to ask you five questions, Mr. Zimmerman,  
19 and I ask that you answer them with an affirmative and  
20 negative and then you can explain all you want. Okay?

21 **A.** Okay.

22 **Q.** Question Number 1: Does AmerisourceBergen take the  
23 position that the purpose of the Controlled Substances Act  
24 and its federal regulations is to prevent diversion? Yes or  
25 no?

1 MR. NICHOLAS: Your Honor, I will object to the  
2 format of the question, both the display and the yes/no box.  
3 I recognize that the witness is on -- is being treated as an  
4 adverse witness, but this is a bit much and I, I don't think  
5 this is an appropriate way to ask questions in this context.

6 THE COURT: Well, I'm going to overrule the  
7 objection and let him answer.

8 Go ahead, Mr. Farrell.

9 BY MR. FARRELL:

10 Q. Does AmerisourceBergen take the position that the  
11 purpose of the Controlled Substances Act and its federal  
12 regulations is to prevent diversion?

13 A. That's one, correct.

14 Q. Does AmerisourceBergen agree that diversion is  
15 foreseeable if registrants fail to comply with federal law?

16 MR. NICHOLAS: Object to the question.

17 THE COURT: Well, it's a loaded question, isn't it  
18 Mr. Farrell?

19 MR. FARRELL: Judge, I'll represent to you that  
20 all five questions were asked of the DEA 30(b)(6) witness.  
21 And I think it would be probative to be able to compare and  
22 contrast the positions taken by AmerisourceBergen and the  
23 positions taken by the United States Drug Enforcement  
24 Agency.

25 THE COURT: All right. I'll let him --

1 Do you have something else to say?

2 MR. NICHOLAS: Well, if, if --

3 THE COURT: I'm going to let him answer. I'm not  
4 sure how helpful this is but, Mr. Zimmerman, go ahead and  
5 answer if you can.

6 THE WITNESS: What part of federal law? I mean,  
7 I'm just curious. There's a lot of federal law.

8 BY MR. FARRELL:

9 Q. We'll start with the Controlled Substances Act.

10 A. So, no. It depends, it depends on -- so you can't just  
11 ask open-ended. So one of the requirements of a cage is  
12 your bolts, your cage bolts need to be welded to the floor.

13 If you don't weld the cage bolt -- it's in the C.F.R.  
14 If you don't weld the cage bolt, is it foreseeable that  
15 there's going to be diversion. I don't think so.

16 So it depends on what aspect or technicality you're  
17 referring to. I don't -- so some, yes, right. If I'm  
18 shipping to somebody that doesn't have a license, yes, it's  
19 foreseeable that diversion would be occurring. If I don't  
20 weld -- if I only weld three of my bolts instead of four on  
21 my cage to the floor, I don't think diversion is foreseeable  
22 in that case.

23 BY MR. FARRELL:

24 Q. Well, let's take, for example, selling a couple  
25 million pills to SafeScript Pharmacy. If you don't

1 maintain effective control according to federal law, is  
2 diversion foreseeable?

3 **A.** Not under our registration it's not. We didn't have  
4 diversion from our warehouse I don't believe.

5 **Q.** If you fail to comply with federal law, more diversion  
6 happens. Do you agree with that?

7 **A.** I guess you're just looking -- it says -- failure to  
8 comply to every regulation? One regulation? I mean, a yes  
9 or no question to a multitude of requirements?

10 **Q.** I had you read aloud the purpose of the Controlled  
11 Substances Act was to prevent diversion. Agreed?

12 **A.** Correct.

13 **Q.** And, so, what I'm asking you is if you don't follow the  
14 laws of the Controlled Substances Act, the foreseeable  
15 result is diversion. Agreed?

16 MR. NICHOLAS: Your Honor, I'm sorry to interrupt.  
17 I hate to keep objecting. I don't want to. But I do  
18 object.

19 THE COURT: I'm going to sustain the objection to  
20 that. The "yes" or "no" format doesn't embrace the universe  
21 of possible, possibilities. And I think the witness's  
22 answer to the last question illustrated that. So I'm going  
23 to sustain the objection.

24 BY MR. FARRELL:

25 **Q.** How about if I skip just to the last question and



1 ask you directly. Do you agree that the more pills a  
2 distributor ships unlawfully into a community results in  
3 more diversion into the illicit market?

4 MS. MAINIGI: Objection, Your Honor, calls for a  
5 legal conclusion.

6 THE COURT: Yeah. How would he know? Sustained.

7 MR. FARRELL: Judge, this is the elements of  
8 causation that the DEA is --

9 THE COURT: Well, I understand that, Mr. Farrell,  
10 but you're loading the, the gun against him here in a way  
11 that appears to me to be unfair because the "yes" or "no"  
12 format doesn't embrace all of the possibilities of the  
13 answer. And --

14 MR. FARRELL: That's fair. Yes, sir.

15 THE COURT: I'm going to sustain the objection.

16 MR. FARRELL: Will you take it down, please.

17 BY MR. FARRELL:

18 **Q.** Let's talk briefly about your policies and  
19 procedures. You would -- you said something earlier,  
20 and I forget the exact words, that your CSRA -- your  
21 policies and procedures were -- was it a corporate  
22 responsibility?

23 **A.** We have CSRA policy. I assume that's what you're  
24 referring to, CSRA policy and procedures.

25 **Q.** So your CSR policies and procedures relating to

1 diversion control, do they apply to all of your distribution  
2 centers?

3 **A.** So we have -- I'd have to see the policies and  
4 procedures because some are strictly for the distribution  
5 center because of the function, and then some are corporate.  
6 So it depends on the policy you're referring to.

7 **Q.** All right. So if we talk about in general suspicious  
8 orders, identifying suspicious orders, or monitoring -- you  
9 agree with me that AmerisourceBergen has an obligation to,  
10 to design and operate a system to identify suspicious  
11 orders?

12 **A.** Yes.

13 **Q.** And that system that you have put in place applies  
14 equally to all distribution centers?

15 **A.** Yes. It --

16 **Q.** And, so, your -- what we call it is SOMS, S-O-M-S.  
17 Correct?

18 **A.** Okay.

19 **Q.** I'm asking you, do you have a different understanding  
20 of -- do you know what the word SOMS means?

21 **A.** I'm just trying to figure out what you're getting at.  
22 So we have policies and procedures that we train our  
23 diversion people that work in the cage involve. They see a  
24 suspicious order, they have an obligation to report it.

25 That's over and completely different than the automated

1 suspicious order reporting process. So, it's a two-step  
2 process. I'm just trying to understand which one -- are we  
3 talking about the manual process of the distribution centers  
4 which would be in all the distribution centers or the  
5 corporate one which is managed at the corporate level which  
6 is more of the due diligence and order reviewing on an  
7 electronic scale?

8 **Q.** That one, the latter one. What, what shall we call  
9 that?

10 **A.** The Order Monitoring Program.

11 **Q.** Okay. We'll call it the OMP?

12 **A.** Yeah.

13 **Q.** Is that OMP policy applicable nationwide?

14 **A.** Yes.

15 **Q.** Okay. Would you call it then systemic, meaning it's a  
16 system, it's a process that applies across the country?

17 **A.** It's a program, yeah.

18 **Q.** So to the extent that your OMP program is effective in  
19 preventing control, do you believe that your successes are  
20 systemic?

21 **A.** Our successes?

22 MR. NICHOLAS: I'll object to the form, or  
23 whatever. I mean, I'll object to the question, but I will  
24 add that it would probably be helpful to have some of these  
25 questions put into a time frame.

1 THE COURT: Sustained.

2 BY MR. FARRELL:

3 Q. During the time frame that you were disclosed as a  
4 30(b)(6) witness -- I believe it's 2006 to 2014 -- are  
5 you familiar with the OMP program being operated by  
6 AmerisourceBergen?

7 A. Yes.

8 Q. Do you believe it was effective?

9 A. Yes.

10 Q. Do you believe it was effective nationwide?

11 A. You said '06 to '14?

12 Q. Yes.

13 A. The program changed in '07.

14 Q. So we'll say from '07 to '14 do you believe your  
15 program was effective?

16 A. Yes.

17 Q. Do you believe it was effective in '06?

18 A. Yes.

19 Q. So let's back up. Between 2006 and 2014 do you believe  
20 your OMP program was effective?

21 A. Yes. I think we've had an OMP program since I started  
22 in 1990. And I think it met all the federal requirements  
23 and has been effective.

24 Q. Okay. So it was effective at preventing diversion?

25 A. From our -- under our, under our control, yes.

1       **Q.** Under your definition of, of diversion, it was  
2 effective?

3       **A.** It met all of our requirements, correct.

4       **Q.** And to the extent that there are problems with your  
5 OMP, those problems are nationwide as well. Do you follow  
6 me? If you're wrong and there's some problem with your OMP  
7 system, program, that's a problem that we'll see across  
8 distribution centers?

9       **A.** I would --

10               MR. NICHOLAS: Objection. I will object to  
11 foundation and relevance.

12               THE COURT: Sustained. I don't see -- well, I'll  
13 sustain the objection.

14       BY MR. FARRELL:

15       **Q.** Were your OMP policies -- I'm sorry. Strike that.  
16 Was your OMP, Order Monitoring Program, were its  
17 practices and policies national in scope?

18       **A.** Yes. We're talking about the corporate -- we're  
19 talking about the corporate one, not the -- they both were,  
20 but just different policies, yes.

21       **Q.** Mr. Zimmerman, the position that you're taking with  
22 regard to your duties under your -- in your OMP, you, you  
23 are aware that the DEA has disagreed with your position on  
24 federal regulatory law?

25       **A.** On what aspect?

1 Q. I'm asking you.

2 A. Oh, I'm sorry. No.

3 Q. Are you aware of whether or not the DEA disagrees with  
4 you?

5 A. I don't know that. I don't know what portion you're  
6 talking about.

7 Q. Let's start with the duty to maintain effective control  
8 and limit it to while the product is in your possession. Do  
9 you understand the DEA has told AmerisourceBergen that it  
10 believes its duty goes beyond that?

11 THE COURT: You've already asked him all this, Mr.  
12 Farrell.

13 MR. FARRELL: Well, I'm going to get ready to go  
14 into the actual DEA letters, the registrant letters, the  
15 Immediate Suspension Order, the settlement agreement, the  
16 letters between, between this witness and others. So I'm  
17 just trying to understand whether or not he is --

18 THE COURT: You asked him the question that you  
19 asked him a while ago that he's already answered. That's  
20 all I have to say.

21 MR. NICHOLAS: That's about all I have to say,  
22 too. I guess if we have, if we have something to show the  
23 witness or ask him about, it would be good to just get to  
24 that at this point.

25 MR. FARRELL: I thought I was getting there by

1 asking a foundation question.

2 THE COURT: Well, go ahead.

3 BY MR. FARRELL:

4 Q. Are you aware of whether or not the DEA agrees with  
5 your interpretation of the responsibility to maintain  
6 effective control? Is that in your knowledge base?

7 A. In my -- I believe we have the same understanding that  
8 we have, we have to maintain effective controls to prevent  
9 diversion. And they issue a DEA registration to each  
10 segment with those same requirements.

11 If you're asking me do I think that our -- we're  
12 responsible for a pharmacy or doctors prescribing it under  
13 their DEA registration, no, we're not. And if they, they  
14 think we do, then I disagree with them.

15 Q. Mr. Zimmerman, I'm not asking you that. I'm asking you  
16 very simply, do you know whether or not the DEA agrees with  
17 your interpretation of your duties under federal law?

18 A. And I said "no."

19 Q. While we're pulling up the first, the first exhibit, I  
20 have a couple questions for you.

21 There was reference made earlier -- when you're  
22 designing -- when you're doing your due diligence, when  
23 you're looking into it, do you consider patient population  
24 around a pharmacy when you're determining a suspicious  
25 order?

1     **A.**    It, it depends on the time frame.  Our program has  
2     evolved over time.

3     **Q.**    Okay.  So my understanding is that you --  
4     AmerisourceBergen basically had three evolutions of its OMP  
5     program.  Is that fair?

6     **A.**    It's three larger evolutions.  It's continually  
7     evolved, if not daily.  So, you know, we add things as we  
8     find more information.  That works.  They keep adding.

9     **Q.**    My understanding is that you had one version of OMP  
10    that was in existence up until about 2007?

11    **A.**    Correct.

12    **Q.**    And then from 2007 to approximately 2014 there was  
13    another iteration of your OMP?

14    **A.**    Correct.

15    **Q.**    And then from 2015 to the present is the third  
16    evolution of the OMP?

17    **A.**    Those are the major ones, but it's evolved, you know,  
18    somewhat, not major overhauls.  I would consider those  
19    significant changes.

20    **Q.**    So are you aware of when Oxycontin was launched?

21    **A.**    Oxycontin?

22    **Q.**    Oxycontin.

23    **A.**    I don't know when it was originally launched.

24    **Q.**    Do you know what Oxycontin is?

25    **A.**    Yes, yes.



1       **Q.**   And did AmerisourceBergen sell Oxycontin?

2       **A.**   Yes.

3       **Q.**   So I'll represent to you that it was sometime around  
4       1996 that the FDA approved it. Are you aware from CSRA of  
5       any abuse or use of Oxycontin that is problematic in  
6       America?

7               MR. NICHOLAS: Objection, foundation. It's just a  
8       super broad question, Your Honor. I'll object to it.

9               THE COURT: Overruled.

10       Answer it if you can, Mr. Zimmerman.

11              THE WITNESS: Today or in -- I mean, what time  
12       frame?

13       BY MR. FARRELL:

14       **Q.**   Any time frame.

15       **A.**   Yes.

16       **Q.**   Are you aware of whether Oxycontin is being used and  
17       abused in America?

18       **A.**   I was aware, yes.

19       **Q.**   Okay. When did you become aware of that?

20       **A.**   I don't know the day and year but, I mean, I know it  
21       became -- it was an issue of abuse, the immediate release --  
22       or not the immediate release but the time-release Oxycontin  
23       became a problem. I don't know what year it was, but it was  
24       after it was released of course.

25       **Q.**   Are you aware of the Congressional hearings in 2001 on

1 Oxycontin use and abuse?

2 **A.** I'm sure I was, but I can't think of it.

3 **Q.** So this is about the time that you became the Vice  
4 President of Corporate Security and Regulatory Affairs at  
5 the newly formed AmerisourceBergen; correct?

6 **A.** 2001, correct.

7 **Q.** And, so, do you have any recollection of following at  
8 that time the Congressional reports about Oxycontin use and  
9 abuse?

10 **A.** I don't recall.

11 **Q.** Are you familiar with the Distributor Initiative in the  
12 meetings with the DEA in 2005?

13 **A.** Yes.

14 MR. FARRELL: Judge, may I approach?

15 BY MR. FARRELL:

16 **Q.** I'm going to show you what has been marked as  
17 P-9112 and we have copies circulating to counsel. And  
18 I'm going to put a flag down here in 2005. Have you  
19 seen this document before?

20 **A.** I've seen it looking through documents but I -- not,  
21 not before just the other day.

22 **Q.** Well, you testified about this two years ago in 2018,  
23 did you not?

24 **A.** I -- maybe -- I'm confused. The top memorandum is from  
25 DEA to DEA. I've never seen that memo before just the other

1 day. Are you talking about the presentation? I've seen  
2 that. I testified to the presentation. But I have never  
3 seen the --

4 **Q.** Take the, take the cover memo and put it to the side.  
5 Let's talk about the presentation. You've seen this  
6 presentation before; correct?

7 **A.** I have seen the -- I wasn't at the presentation with  
8 the DEA, but I've seen the presentation, correct.

9 **Q.** Who gave it to you?

10 **A.** Steve Mays.

11 **Q.** Do you know when he gave it to you?

12 **A.** I believe when he came back from the meeting.

13 **Q.** Okay. Did you know about the meeting beforehand?

14 **A.** I don't -- I, I would have. I mean, he reported to me,  
15 so I would have, but I don't recall in my head.

16 **Q.** I'm not being pejorative, but you're the head of CSRA?

17 **A.** Yes.

18 **Q.** And the DEA has called a meeting to talk about  
19 diversion of prescription opioids and you did not attend it.  
20 Was there -- do you recall whether or not you had other  
21 obligations or there was some reason you weren't there?

22 **A.** I don't recall that.

23 **Q.** But Steve Mays was there on behalf of  
24 AmerisourceBergen; correct?

25 **A.** Yes. And it could have been that he was the one that

1 the DEA contacted to come to the meeting. I, I don't  
2 remember the mechanics of it.

3 MR. FARRELL: Judge, P-9112 is a document that is  
4 referenced as an exhibit for the deposition of Thomas  
5 Prevoznik that has been submitted to you.

6 What I will do is I will remove the front page that --  
7 which is Bates stamped 0001 and 0002. And I would ask for  
8 the admission of P-9112a which will be just the pages Bates  
9 stamped 0003 through 00018.

10 THE COURT: Any objection to this? Do you want it  
11 admitted?

12 MR. FARRELL: Yes, sir.

13 THE COURT: Any objection?

14 MR. NICHOLAS: Could we hear a little bit more  
15 about it before, before it's admitted?

16 THE COURT: Well, it's -- he said he knew about  
17 the meeting and he knew one of his people went. But that  
18 doesn't -- it doesn't seem to me that that sufficiently  
19 identifies the exhibit to make it admissible. And it's  
20 probably got all kinds of hearsay in it.

21 BY MR. FARRELL:

22 Q. So let's start with just the examination of it.  
23 Can you, can you bring up -- we're going to go through  
24 some of the slides. Okay, Mr. Zimmerman?

25 A. Yeah.

1       **Q.**    Can you go to Page 2 on the slide that is Bates stamped  
2       Page 4. Go to the next page, please. I think you can back  
3       up one, "Issues to Consider."

4               So you see at the bottom right-hand corner US-DEA Bates  
5       stamp 150, Mr. Zimmerman?

6       **A.**    Yeah.

7       **Q.**    And then this is actually P-9112 and we'll designate it  
8       little a for the time being, Page 4. Will you read what it  
9       says up above, "Issues to Consider."

10      **A.**    Want me to read it out loud?

11      **Q.**    Sure.

12      **A.**    "Frequency of orders, size of orders, range of products  
13       purchased, payment method, pharmacy location, percent  
14       controlled versus non-controlled, customer pick-up at  
15       distributor."

16      **Q.**    Okay. So are you aware that the DEA, at least as of  
17       2005, was advising AmerisourceBergen that you had issues to  
18       consider beyond just the frequency and size of orders, but  
19       that you needed to look into payment method, the pharmacy  
20       location, percent versus -- controlled versus percent  
21       non-controlled, and whether or not the customers were  
22       picking up at the distributors? Were you aware of this?

23      **A.**    I mean, it's on the slide. I mean --

24      **Q.**    I'm not asking you if it's on the slide. I'm asking  
25       you whether in 2005 you were aware that the DEA was so

1 advising AmerisourceBergen.

2 **A.** They did it in -- through the presentation in the  
3 meeting with Steve. They did this presentation, correct.

4 **Q.** The bottom portion of the slide says DEA distributor  
5 registrations. Would you please read the section below, the  
6 last bullet point?

7 **A.** "Maintenance of effective controls against diversion of  
8 particular controlled substances into other than legitimate  
9 medical channels."

10 **Q.** Were you aware that the DEA was advising  
11 AmerisourceBergen in 2005 that your registration was  
12 dependent upon maintaining effective controls against  
13 diversion?

14 **A.** And the illegitimate medical channels like unlicensed  
15 pharmacies, that's correct.

16 **Q.** Go to the next slide. Do you see up here it says  
17 Supreme Court case, *Direct Sales vs. United States*, 1943?  
18 Do you see that?

19 **A.** I do.

20 **Q.** All right. Did the DEA tell CSRA to be aware of the  
21 *Direct Sales* case from 1943 during the distributor meeting  
22 with them in 2005?

23 **A.** It's on the slide, so it would have -- again, you're  
24 asking me if they covered that. I wasn't at the meeting.

25 **Q.** Okay. Did Mr. Mays come and tell you about the

1 meeting?

2 **A.** Yes.

3 **Q.** So you, the head of CSRA, had this in your hand and you  
4 knew it came from the DEA; correct?

5 **A.** Yes.

6 **Q.** You were on notice that the DEA in 2005 was citing this  
7 case from 1943 in a private meeting with AmerisourceBergen's  
8 CSRAs; correct?

9 **A.** Yes.

10 **Q.** And are you familiar with the holding of this case and  
11 the meaning of citing this case in this document?

12 **A.** I don't.

13 **Q.** Did you read this case?

14 **A.** I don't recall.

15 **Q.** Were you interested in what this case had to say?

16 **A.** I don't recall.

17 **Q.** All right. Next slide, please. Go to page -- it will  
18 be slide Page 7. It will be Page 9. There we go.

19 This says "Suspicious Orders." And we don't need to go  
20 through this again. But do you see the second bullet point,  
21 "Report Suspicious Orders to DEA When Discovered." Do you  
22 see that?

23 **A.** Yes.

24 **Q.** All right. So do you acknowledge that this is a  
25 communication by the DEA to CSRA that you have a duty to

1 report suspicious orders when discovered?

2 **A.** Yes.

3 **Q.** That was the DEA's position is that when you discover  
4 it, you have to tell us; correct?

5 **A.** Yes.

6 **Q.** And did you infer in that that you were still allowed  
7 to ship it?

8 MR. NICHOLAS: Object to the -- I'll object to the  
9 lack of foundation. It's a loaded question.

10 THE COURT: Well, if he knows.

11 THE WITNESS: What, what time frame again are you  
12 referencing?

13 BY MR. FARRELL:

14 **Q.** This is 2005.

15 **A.** Yes, report, report suspicious orders to DEA when  
16 discovered, correct.

17 **Q.** And, so, did you, the head of CSRA, interpret this to  
18 mean that you could still ship the order after you reported  
19 it?

20 **A.** Yes.

21 **Q.** Why would they have -- what would be the purpose of  
22 reporting an order that's suspicious when it's discovered to  
23 still ship it?

24 **A.** Because a suspicious is not a bad order. A suspicious  
25 order -- when we stop an order that affects -- it affects



1 patient care. These are legitimate drugs. Right? They're,  
2 they're -- there's patients that need those drugs. The  
3 pharmacy places the order. The patient's going to be coming  
4 to pick it up. You have a doctor that made the decision to  
5 write this prescription. You have a pharmacy that sees the  
6 patient and has a corresponding responsibility to fill the  
7 prescription. And then you want us to override it.

8 The regulation was written to report a suspicious order  
9 and then ship it not to affect patient care. If there's  
10 something bad with the order, DEA has it suspicious. They  
11 should take action, either close the pharmacy, revoke the  
12 doctor's license. Our responsibility is to report the  
13 suspicious order, not the bad order.

14 **Q.** So is it fair to say that you believe this is not your  
15 job?

16 **A.** What job? Our job is to report suspicious orders and  
17 the DEA takes that information and they perform their  
18 enforcement or regulatory responsibility, correct.

19 **Q.** So once the pills leave your physical control, it's not  
20 your job to prevent diversion?

21 **A.** I have no ability to prevent diversion outside of the  
22 control of those products, correct. We're responsible to  
23 make sure we get the transportation company that delivers to  
24 the pharmacy. And there's a reason why the pharmacist has  
25 to sign, or the pharmacy has to sign for to change control

1 from our registration. It transfers. The quantity  
2 transfers from our registration to their registration with  
3 the same requirements.

4 **Q.** Okay. Let's go to the next slide, same slide deck,  
5 same time frame, suspicious orders. Will you read the  
6 bullet point the DEA was communicating to AmerisourceBergen?

7 **A.** "Reporting a suspicious order to DEA does not relieve a  
8 distribution [sic] of the responsibility to maintain  
9 effective controls."

10 **Q.** So I take it you disagree with this?

11 **A.** No, I agree with that. We have a lot of other controls  
12 to prevent diversion. Just because we report suspicious  
13 orders, that doesn't mean we can't keep product in the  
14 vault, have an order keeping recommendations, the same  
15 criminal background.

16 All those are under the C.F.R. for -- adequate controls  
17 to prevent diversion include a multitude of things, one  
18 being a suspicious order.

19 I read that if you do not -- by reporting a suspicious  
20 order doesn't mean you relieve yourself of all those other  
21 requirements under the C.F.R. to prevent diversion. That's  
22 how I read that. I, I agree with that.

23 **Q.** Go to Page 13, summary page of this slide deck.

24 "The pattern of drugs being distributed to pharmacies  
25 who are diverting controlled substances demonstrates the

1 lack of effective controls against diversion by the  
2 distributor."

3 Does this slide not communicate to you, Mr. Zimmerman,  
4 that the DEA is telling you your obligations go beyond just  
5 ensuring that the pharmacy has a DEA registration?

6 **A.** If we have knowledge that the -- "The pattern of drugs  
7 being distributed to pharmacies --"

8 COURT REPORTER: Excuse me, Mr. Zimmerman. Slow  
9 down, please.

10 THE WITNESS: I'll slow down.

11 I don't know they're diverting controlled substances.  
12 That statement says the pattern of drugs you're selling to  
13 the pharmacies, if they're diverting those controlled  
14 substances demonstrates a lack of effective controls. I  
15 agree with that statement. But I don't -- we don't know  
16 those pharmacies are diverting those drugs or we wouldn't be  
17 selling them to them.

18 BY MR. FARRELL:

19 **Q.** Sure. Let's talk -- let's switch topics real  
20 quick. Let's talk about an argument that was made  
21 that -- does AmerisourceBergen consider whether or not a  
22 community is a healthcare hub when determining  
23 thresholds or the volume of pills sold to a pharmacy?

24 **A.** I'm not familiar with that term.

25 **Q.** Yeah, that's, that's inartful. Does AmerisourceBergen

1 consider whether or not there are hospitals within a  
2 community when determining whether or not the volume of  
3 pills is suspicious?

4 **A.** I'm not sure.

5 **Q.** Does AmerisourceBergen consider any patient  
6 demographics when determining the appropriate volume of  
7 pills or setting thresholds in the community?

8 **A.** In what time frame?

9 **Q.** Let's just say 2007.

10 **A.** I don't believe we were looking at that.

11 **Q.** How about does AmerisourceBergen look into age or, or  
12 obesity or any other demographics when determining an  
13 appropriate level of opioids to sell?

14 **A.** In 2007, no.

15 **Q.** Are you aware of any justification for -- internally at  
16 CSRA when you do your due diligence on proximity of a  
17 pharmacy to, say, a pain clinic or a physician's office or a  
18 tertiary care facility?

19 **A.** I think that's one of the items they look at.

20 **Q.** For instance, your lawyers in this case in both opening  
21 and on several other occasions mentioned the fact that there  
22 are 29 other counties that send patients to the hospitals in  
23 Huntington. Have you heard this before?

24 **A.** No. I mean, I'm not sure what you're referencing.

25 **Q.** Let me ask you --

1       **A.**    I know people have traveled to the hospitals.  I just  
2       don't know the exact statement you're making.

3       **Q.**    Have you been following this trial so far?

4       **A.**    You mean like reading transcripts and stuff?  No.

5       **Q.**    Have you been watching it?

6       **A.**    Not from -- I've been told not to watch it.

7       **Q.**    Did you see opening or read about opening?

8       **A.**    No.

9       **Q.**    Okay.  So you're aware, though, that one of the  
10       defenses that AmerisourceBergen is raising is that CSRA was  
11       justified in clearing orders into Cabell County because it  
12       was a hub of healthcare for the 29 surrounding counties?  
13       You're aware of that?

14               MR. NICHOLAS:  I'll object to the question in  
15       light of the last, the previous three or four answers and in  
16       light of the fact that he's characterizing I guess what I  
17       said in my opening.  I'll object to the -- I'll object to  
18       the question.

19               THE COURT:  Sustained.

20               MR. FARRELL:  Your Honor, they've asked our  
21       witnesses on no less than 10 occasions --

22               THE COURT:  Well, I sustained the objection, Mr.  
23       Farrell.  You're stuck with that.

24               MR. FARRELL:  Yes, sir.

25       BY MR. FARRELL:

1       **Q.** Does it -- you said that it does make a difference  
2       if a community is a healthcare hub in a, in a particular  
3       region. Agreed?

4       **A.** I said they take into account.

5       **Q.** Take into account?

6       **A.** Right. That's one of the elements that they look at,  
7       correct.

8       **Q.** So do you also take into account the volume of pills in  
9       the surrounding communities?

10      **A.** In 2007?

11      **Q.** At any point.

12      **A.** I'm not sure. I don't know.

13      **Q.** You're the head of CSRA and you've said that a factor  
14      in determining whether or not a volume of pills is excessive  
15      is whether or not it's a hub for healthcare for surrounding  
16      counties. That was your testimony. Correct?

17      **A.** I said that's one of the elements they look at.

18      **Q.** It's one of the elements?

19      **A.** Right.

20      **Q.** So my question to you is whether or not you also look  
21      as an element on what the surrounding counties --

22      **A.** Right.

23      **Q.** -- are, are purchasing to determine whether or not the  
24      shipments are appropriate.

25      **A.** And I said I don't know.

1       **Q.** For instance, reference was made earlier to the fact  
2       that the two hospitals in Huntington/Cabell County, West  
3       Virginia, serve the 29 surrounding counties.

4             My question to you is, is in the surrounding counties  
5       would you have looked at the volume of pills at those places  
6       or looked up which counties serviced the hospitals?

7             MR. NICHOLAS: Objection, asked and answered  
8       several times.

9             MR. FARRELL: This is different. This is  
10       different.

11            THE COURT: Yeah, overruled.

12            THE WITNESS: I don't know.

13       BY MR. FARRELL:

14       **Q.** I'm going to give you a specific example.

15             Will you bring up the Mountain Health Network.

16             So it was referenced earlier and you've said as an  
17       element there are two big hospitals in Huntington/Cabell  
18       County. And, so, it's not surprising that perhaps those  
19       numbers are elevated. Do you understand what that position  
20       would be?

21       **A.** Did I -- I said that?

22       **Q.** I'm asking you this.

23       **A.** Oh, I thought you said I said there were two large --

24       **Q.** You testified that it is an element as to whether or  
25       not a particular location is a hub or a tertiary care

1 facility that justifies elevated numbers. Okay? You said  
2 that's a factor.

3 **A.** That's just one of the elements they look at, yes.

4 **Q.** So this is -- from the healthcare hospital in  
5 Huntington, Cabell County that services other counties,  
6 would your CSRA have considered, in addition to the volume  
7 of pills coming into Cabell County, would you expect your  
8 CSR investigators to look at what other counties are  
9 referring patients to Cabell County, including in Kentucky  
10 Boyd County, Carter County, Greenup County, Johnson County,  
11 Lawrence County, Martin County; in Ohio, Gallia County,  
12 Lawrence County, Meigs County, Scioto County, the Dreamland,  
13 Portsmouth; and in West Virginia Boone County, Fayette  
14 County, Jackson County, Kanawha County, Lincoln County,  
15 Logan County, Mason County, Mingo County, Putnam County,  
16 Raleigh County, Wayne County, and Wyoming County?

17 MR. NICHOLAS: I'll object to -- I guess I'd like  
18 to see the -- I think this is based on a document. Mr.  
19 Farrell is holding a document in his hand. I don't know if  
20 that's the document that we're talking about. This is  
21 simply a display that he's reading from and I guess he's put  
22 together. And I think there's a lack of foundation or  
23 backup for it.

24 THE COURT: Well, I don't understand where you're  
25 going with this, Mr. Farrell.



1 MR. FARRELL: Well, so, the, the witness has  
2 testified that he would consider the fact that there are two  
3 big hospitals in Huntington as justification for there being  
4 a higher volume of pills because --

5 THE COURT: So you're saying patients would come  
6 from other places and that would impact the numbers.  
7 Correct?

8 MR. FARRELL: So that's what I'm saying, Judge.

9 THE COURT: I got the point, didn't I?

10 MR. FARRELL: Yes, sir.

11 THE COURT: I'm going to overrule the objection.

12 Can you answer the question?

13 THE WITNESS: I don't know.

14 THE COURT: Okay.

15 BY MR. FARRELL:

16 **Q.** All right. I think we can put away the Distributor  
17 Initiative.

18 MR. FARRELL: Oh, can I renew my admission to  
19 admit P-9112a that removes the front page?

20 THE COURT: Well, is there any objection to it?

21 MR. HESTER: Your Honor, we would object to its  
22 introduction for the truth.

23 THE COURT: Well, that's right, isn't it,  
24 Mr. Farrell?

25 MR. FARRELL: Well, it may, it may be right, but

1 it doesn't matter because it's more of the notice, of the  
2 DEA putting AmerisourceBergen of notice of the contents  
3 therein.

4 THE COURT: How about that, Mr. Hester?

5 MR. HESTER: We don't object to its introduction  
6 on the basis that it was stated, but it just can't be  
7 introduced for the truth in our view. That would be our  
8 objection, Your Honor.

9 MR. NICHOLAS: I don't object to the admission of  
10 the document, but I would ask actually that the entire  
11 document be put in including the cover page.

12 THE COURT: Including the title?

13 Do you want the cover in, Mr. Farrell?

14 MR. FARRELL: I, I feel like I'm on a  
15 merry-go-round, Judge. I'm the one that tried to put it in  
16 and they objected.

17 THE COURT: Well, the situation has changed now.  
18 They're wanting it in.

19 MR. FARRELL: I need to be adaptable. So, yes, I  
20 want it in, Judge.

21 THE COURT: We haven't heard from Cardinal.

22 MS. SALGADO: Your Honor, we also object to its  
23 introduction for the truth.

24 THE COURT: All right. I'm going to admit it for  
25 the limited purpose that it bears upon notice. And I'm not

1 going to admit it for the truth of the matter asserted  
2 because it's obviously loaded with hearsay.

3 MR. FARRELL: Thank you, Your Honor.

4 BY MR. FARRELL:

5 Q. All right. The next document is P-32. And I'm  
6 going to have to make an explanation of this.

7 MR. FARRELL: P-32 is a composite exhibit. And,  
8 Judge, may I approach?

9 THE COURT: Pardon me?

10 MR. FARRELL: May I approach?

11 THE COURT: Yes, you may.

12 MR. FARRELL: This is the series of letters from  
13 the DEA to AmerisourceBergen. And it's all of the letters,  
14 but we're going to, we're going to take them in  
15 chronological order.

16 BY MR. FARRELL:

17 Q. So I'd have you flip to Page 9 at the bottom, --

18 A. Okay.

19 Q. -- the document dated September 27th, 2006.

20 Mr. Zimmerman, let me know when you're ready.

21 A. Is this the first document?

22 Q. Yes, the September 27th, 2006, letter.

23 A. Okay.

24 Q. Have you seen this document before?

25 A. I have.

1 Q. What is it?

2 A. It's a -- I think it's somekind of guidance letter that  
3 the DEA mailed to registrants.

4 Q. Have you, have you read it before?

5 A. I have.

6 Q. And do you recognize it as a communication from the  
7 United States Drug Enforcement Agency to AmerisourceBergen  
8 related to the duties to maintain effective control and for  
9 the purposes of monitoring suspicious orders?

10 A. Yeah. It doesn't say -- I mean, it's not addressed to  
11 anybody, but I think they mass mailed it to the  
12 distribution, the registrants.

13 Q. Okay. You've testified about this letter, have you  
14 not?

15 A. I'm sure they asked me questions about that in my  
16 deposition, yes.

17 Q. And you acknowledge on behalf of AmerisourceBergen that  
18 you received this letter from the DEA?

19 A. Yes.

20 Q. We have referred to it as the Rannazzisi Letter Number  
21 1. Have you heard that phrase used before?

22 A. I have not.

23 Q. I'm going to call it Rannazzisi Letter Number 1 because  
24 it's signed by Joe Rannazzisi. Do you know who Joe  
25 Rannazzisi is?

1       **A.**    I think he was the assistant administrator at the time.

2       **Q.**    Have you met Joe Rannazzisi?

3       **A.**    I have.

4       **Q.**    How many times?

5       **A.**    A couple.

6       **Q.**    Have you talked to him about suspicious order  
7 monitoring and diversion?

8       **A.**    In a group.

9       **Q.**    Are you aware that this letter was intended to be sent  
10 to AmerisourceBergen to place it on notice of the positions  
11 taken by the DEA?

12       **A.**    I don't know -- I don't know the actual intent. It was  
13 distributed to all the distribution centers.

14       **Q.**    And you read it?

15       **A.**    We've read it, yes. I've read it.

16       **Q.**    Did you circulate this to your group?

17       **A.**    I think it was sent to the -- it wasn't sent to me  
18 because it was sent to the registrant. So it would have  
19 went to the distribution center, then probably made its way  
20 up to my group.

21       **Q.**    And when you say to your group, did you forward this to  
22 the other members of your department?

23       **A.**    I probably did or they forwarded it to me.

24       **Q.**    So let's start with the date. What's the date of the  
25 letter?

1       **A.**     September 27th, 2006.

2       **Q.**     Do you see down in the bottom right-hand corner the  
3       Bates stamp with the letters ABDC-MDL?

4       **A.**     Yes.

5       **Q.**     Okay. You don't have to name the zeros, but can you  
6       read the numbers?

7       **A.**     MDL-00378501.

8       **Q.**     And do you recognize this as a Bates stamp from  
9       AmerisourceBergen's files?

10      **A.**     Yes.

11      **Q.**     All right. I'm also going to have you reference the P  
12      numbers, P-32 underscore 9. Do you see that?

13      **A.**     Yes.

14      **Q.**     So there are other letters that are in this block that  
15      we'll be talking about. But for right now, we're just going  
16      to be talking about Pages 9 and 10.

17             So what I'd like you to do is let's start with the very  
18      first paragraph. Will you read the first sentence?

19      **A.**     "This letter is being sent to every commercial entity  
20      in the United States registered with the Drug Enforcement  
21      Administration to distribute controlled substances."

22      **Q.**     And what did the DEA tell you was the purpose of this  
23      letter?

24      **A.**     To reiterate the responsibilities of controlled  
25      substance distributors in view of the prescription drug

1 abuse problem our nation currently faces.

2 **Q.** All right. So let's go to the very first paragraph  
3 now. Do you see where it says "Background"?

4 **A.** Yes.

5 **Q.** Will you read the first sentence.

6 **A.** "As each of you is undoubtedly aware, the abuse of  
7 non-medical use of controlled prescription drugs is a  
8 serious and growing health problem in this country."

9 **Q.** Do you agree that as of 2006, from your perspective at  
10 AmerisourceBergen, that the abuse, non-medical use of  
11 controlled prescription drugs was a serious and growing  
12 health problem in the United States?

13 **A.** Yes.

14 **Q.** Do you see where it has a footnote?

15 **A.** Yes.

16 **Q.** All right. At the very bottom, can we blow up the  
17 footnote?

18 When you got this letter, did you go look up what that  
19 footnote says?

20 **A.** I don't recall.

21 **Q.** All right. Let's go to the next paragraph.

22 **A.** Want me to read it?

23 **Q.** Starting with, "The CSA was designed," and read the  
24 next sentence, please.

25 **A.** "The CSA was designed by Congress to combat diversion

1 by providing for a closed system of drug distribution in  
2 which all legitimate handlers of controlled substances must  
3 obtain a DEA registration and, as a condition of maintaining  
4 such registration, must take reasonable steps to ensure that  
5 their registration is being utilized as a source of  
6 diversion."

7 **Q.** Do you agree with that statement?

8 MR. NICHOLAS: Your Honor, it was misread.

9 MR. HESTER: I object. The witness missed a  
10 "not."

11 THE WITNESS: It says "not utilized." Sorry. You  
12 shouldn't have me read.

13 BY MR. FARRELL:

14 **Q.** That's okay. The next sentence is really the one  
15 that is the most key that I'm interested in. Will you  
16 read it, please?

17 **A.** "Distributors are, of course, one of the key components  
18 of the distribution chain."

19 **Q.** Do you agree with that?

20 **A.** We are a key component of the distribution chain.

21 **Q.** What's the next one?

22 **A.** "If the closed system is to function properly as  
23 Congress envisioned, distributors must be vigilant in  
24 deciding whether a prospective customer can be trusted to  
25 deliver controlled substances only for lawful purposes."



1 Q. Do you agree with that?

2 A. I think we have a responsibility to make sure they have  
3 their license. I, I differ in your inference that just  
4 because we give you a DEA registration you should, you  
5 shouldn't sell them drugs. I don't agree with that portion.  
6 I think DEA has a responsibility for issuing registrations  
7 and it's their responsibility for the pharmacies to maintain  
8 them, and they have the authority to revoke them. We don't  
9 have any of that authority, nor should we.

10 Q. It's not your job?

11 A. It's not our job to police the pharmacies? It's not  
12 our job to police the pharmacies, that's correct.

13 Q. The next sentence?

14 A. "This responsibility is critical as Congress has  
15 expressly declared that the illegal distribution of  
16 controlled substances has a substantial and detrimental  
17 effect on the health and general welfare of the American  
18 people."

19 Q. Do you agree with that?

20 A. Yeah, illegal distribution, yes.

21 Q. So let's go to Page 2.

22 We're not going to go through -- oh, there it is, Page  
23 2.

24 I'm going to -- I'm not going to have you read the  
25 entire document. I'm going to ask for its admission to the

1 Court eventually.

2 What I am going to want you to do is I want you to go  
3 to the word "nonetheless" in the second full paragraph. Do  
4 you see that?

5 **A.** Yes, second paragraph.

6 "Nonetheless, given the extent of the prescription drug  
7 abuse in the United States, along with the dangerous and  
8 potentially lethal consequences of such abuse, even just one  
9 distributor that uses its DEA registration to facilitate  
10 diversion can cause enormous harm."

11 **Q.** Do you agree with that?

12 **A.** After "illegally distributed product," yes.

13 **Q.** If the distributor is illegally distributing a product?

14 **A.** Yeah.

15 **Q.** And, so -- okay. Let's go to, let's go to the  
16 paragraph starting "thus." Keep going, please. Do you see  
17 this paragraph here? I think it's the third from the  
18 bottom. Would you please read that paragraph?

19 **A.** "Thus, in addition to reporting all suspicious orders,  
20 a distributor has a statutory responsibility to exercise due  
21 diligence to avoid filling suspicious orders that might be  
22 diverted into other than legitimate medical, scientific and  
23 industrial channels. Failure to exercise such due diligence  
24 could, as circumstances warrant, provide a statutory basis  
25 for revocation or suspension of a distributor's

1 registration."

2 **Q.** Now, this appears to conflict with your view of the  
3 statutory requirements. Would you agree with that?

4 **A.** Yes. I don't agree with it.

5 **Q.** You do not agree with it?

6 **A.** Huh-uh.

7 **Q.** But you concede, though, that in 2006 the DEA is  
8 putting you on notice that that was their interpretation.

9 **A.** So I worked with the DEA from '96 to '98 to devise a  
10 suspicious order reporting program. I worked with them for  
11 two years. And we worked with the different offices and we  
12 created a suspicious order report that shipped orders after  
13 they were identified.

14 It was signed off on by the program managers of the  
15 DEA. It was signed off by the chief of the diversion unit  
16 at DEA. And that was the program that we had in place at  
17 this time.

18 Now, I can take my two years of work and a letter from  
19 the chief of the diversion unit or a letter that's not even  
20 addressed to us. It just says "registrant." I'm going to  
21 go with my two years of work. And never once did they  
22 mention what they felt their interpretation was because  
23 their interpretation was you do ship the order. And all I  
24 could -- so I'm going to go with my two years and approved  
25 letter versus an unregistered letter.

1 Q. Did you follow up on this letter? Did you call Mr.  
2 Rannazzisi?

3 A. I don't think so.

4 Q. Did you send them a letter?

5 A. I know I didn't. Excuse me?

6 Q. Did you send them a letter? Did you write to them?

7 A. No.

8 Q. Let's go to the next paragraph starting with, "Given  
9 the requirement under Section 823(e) that a distributor  
10 maintain effective controls against diversion," will you  
11 finish the sentence, please?

12 A. "Given the requirement under Section 823(e) that a  
13 distributor maintain effective controls against diversion, a  
14 distributor may not simply rely on the fact that the person  
15 placing the suspicious order is a DEA registrant and turn a  
16 blind eye to the suspicious circumstances."

17 Q. Do you agree with that?

18 A. Yeah. I don't think you should -- you can't ignore  
19 what's going on.

20 Q. Mr. Zimmerman, this is, this is saying something a  
21 little different. So the court reporter has it, this  
22 sentence from the DEA is literally saying that you may not  
23 rely upon the fact that the person you're selling these  
24 drugs to has a DEA registration and turn a blind eye to  
25 suspicious circumstances or you may lose your license.

1           That's what the DEA is telling you at ABC; correct?

2           MR. NICHOLAS: I'll object. He's testifying.  
3 He's interpreting.

4           THE COURT: Yeah, I agree. You're, you're --  
5 that's not the witness, Mr. Farrell.

6           MR. FARRELL: That's a very poor question.

7 BY MR. FARRELL:

8 **Q.** You would agree with me, then, that -- did the DEA  
9 provide notice to AmerisourceBergen that selling to a  
10 registrant, a duly licensed registrant is insufficient  
11 to comply with federal regulations?

12 **A.** Say that one more time, sir.

13 **Q.** Did the DEA provide notice to you, Chris Zimmerman, as  
14 the head of CSRA at AmerisourceBergen that you had to do  
15 more than just check to see if the pharmacy had a valid DEA  
16 registration?

17 **A.** I mean, in this letter -- he, he mentions it in the  
18 letter. But there's no change in regulation, no change --  
19 again, they're trying to regulate by letter and there's a  
20 process. If you want to change the regulations or your  
21 requirements, then there's a process to do that, and it's  
22 usually not from an unregistered letter that's not even a  
23 mention at the top. I mean, so --

24 **Q.** Sir, you were on notice that the DEA was requiring ABC  
25 to prevent diversion.

1     **A.**    We prevent diversion and we don't just rely on the  
2     license, correct. We would have a whole host of other  
3     things that we looked at to make sure that all the other  
4     regulatory requirements to prevent diversion are in place,  
5     including reporting suspicious orders.

6     **Q.**    So we're going to put a pin on this and come back to  
7     the other letters. But you are aware, are you not, that  
8     soon after this in April of 2007 the DEA suspended your, one  
9     of your distribution centers for failing to maintain  
10    effective control?

11    **A.**    Correct.

12    **Q.**    For the very things that were in the Rannazzisi Letter  
13    1, AmerisourceBergen got one of its distribution center's  
14    license temporarily suspended?

15    **A.**    Correct.

16    **Q.**    And in the allegations in the Immediate Suspension  
17    Order was that --

18           Well, first, can we have the copies, please?

19           Judge, may I approach?

20           THE COURT: Yes.

21    BY MR. FARRELL:

22    **Q.**    This is P-49. Mr. Zimmerman, do you recognize this  
23    document?

24    **A.**    I do.

25    **Q.**    What is it?

1       **A.**     It's an order to show cause and immediate suspension of  
2       registration dated April 19th.

3       **Q.**     And is this -- was this served on AmerisourceBergen?

4       **A.**     It was served on April 24th, five days after.

5       **Q.**     But you know what it is? You've seen it, you've read  
6       it?

7       **A.**     Yes.

8       **Q.**     You were involved in the process following the service  
9       of the Immediate Suspension Order?

10      **A.**     Yes.

11      **Q.**     And you negotiated a resolution of it?

12      **A.**     I worked on that, yes.

13               MR. FARRELL: Judge, I'd move P-49 into the  
14       record.

15               MR. NICHOLAS: We have no objection, Your Honor.

16               THE COURT: Is there any objection?

17               MR. HESTER: No objection.

18               MR. NICHOLAS: No objection, Your Honor.

19               THE COURT: It's admitted.

20       BY MR. FARRELL:

21      **Q.**     So if you look at Paragraph 1 on the front page,  
22       the allegation is that AmerisourceBergen sold to a  
23       single pharmacy over a period of 13 months 3.8 million  
24       dosage units of hydrocodone. You're aware of that  
25       allegation?

1       **A.**    Yes.

2       **Q.**    Was that true?

3       **A.**    I believe so.

4       **Q.**    And look at Paragraph 3. The allegation was that from  
5       January '06 to January '07 to a different pharmacy, that  
6       AmerisourceBergen sold over a million hydrocodone dosage  
7       units. Was that allegation true?

8       **A.**    Yes, which, which was identified by us, reported to the  
9       DEA, and closed by us --

10      **Q.**    So --

11      **A.**    -- prior to this order.

12      **Q.**    Then go to Page 3, the top of Page 3. The Immediate  
13      Suspension Order says that there was a meeting on  
14      August 10th, 2015, where AmerisourceBergen was warned that  
15      they had sold over 5.2 million dosage units to pharmacies  
16      that bore characteristics that describe -- that were  
17      described during that meeting.

18      **A.**    Uh-huh.

19      **Q.**    Do you understand that's the allegation?

20      **A.**    That's the allegation.

21      **Q.**    And you understand that this is now following that  
22      distributor initiative meeting, following Rannazzisi Letter  
23      1, AmerisourceBergen was still doing the same thing under  
24      their same policies?

25      **A.**    Under the approved program by the DEA, correct. We



1 were following our approved DEA program, correct.

2 **Q.** And that's why you got an Immediate Suspension Order?

3 **A.** I don't know why we -- I don't know that for sure.

4 **Q.** Well, it says right here that in the allegations of the  
5 Immediate Suspension Order that they met with you, they  
6 warned you, and you continued to sell after the meeting in  
7 volumes that were excessive, and that's why you were getting  
8 suspended. Agreed?

9 **A.** We closed three or four on here well before -- we  
10 conducted over 100 investigations after that '05 meeting to  
11 go over the things that were identified in the presentation.  
12 We closed some of those accounts and then we created  
13 additional forums to protect the company.

14 So we took action from 2005 to 2007. And then prior to  
15 2006 working with the local DEA office in Orlando, we shut  
16 down other pharmacies that were diverting product.

17 So this was a surprise to me when we received it  
18 because we were doing the things that they went over in the  
19 meeting. We were working with the local DEA office. We had  
20 shut down the majority of the pharmacies noted in here. And  
21 it took them five days to serve an immediate order.

22 **Q.** Okay. Subsequent to that, you personally negotiated a  
23 settlement agreement with the DEA; correct?

24 **A.** Correct.

25 MR. FARRELL: Judge, may I approach?

1 THE COURT: Yes.

2 BY MR. FARRELL:

3 Q. I'm going to hand you what's P-9. I'll give you a  
4 second to read it. Is this the Settlement Agreement and  
5 Release that you entered into on behalf of  
6 AmerisourceBergen following the Immediate Suspension  
7 Order?

8 (Pause)

9 Mr. Zimmerman, please tell me when you're ready.

10 A. Yep.

11 Q. This is a settlement agreement dated June 22, 2007.  
12 Have you seen this document before?

13 A. I have.

14 Q. Can you verify and validate that this is the settlement  
15 agreement entered into between the DEA and AmerisourceBergen  
16 following the Immediate Suspension Order we just discussed?

17 A. Yes.

18 MR. FARRELL: Judge, I'd ask for the admission of  
19 P-9.

20 THE COURT: Any objection?

21 MR. NICHOLAS: No objection.

22 BY MR. FARRELL:

23 Q. As you go to Page 2 --

24 THE COURT: Wait a minute.

25 MR. HESTER: No objection, Your Honor.

1 MS. MAINIGI: No objection.

2 THE COURT: There being no objection, it's  
3 admitted.

4 BY MR. FARRELL:

5 Q. Let's go to Page 2. There's no admission of fault  
6 in this, is there, sir?

7 A. That's what it says, yeah.

8 Q. But if you look at Paragraph 3, "Covered Conduct," it  
9 includes not only the facility -- I wish I had my glasses --  
10 in Orlando, but this release also covers all other  
11 distribution facilities controlled by AmerisourceBergen with  
12 respect to all sales of ARCOS reportable controlled  
13 substances. Correct?

14 A. Yes.

15 Q. You negotiated a release on behalf of every  
16 distribution center in America; correct?

17 A. It includes -- the system included all distribution  
18 centers, correct.

19 Q. And, in fact, they list -- on the back page they list  
20 an appendix. And one of those distribution centers included  
21 in this release and agreement is the Lockbourne, Ohio, one  
22 that shipped to Huntington/Cabell County. Agreed?

23 A. I would assume so.

24 Q. Let's go back to Page 2, "Obligations of  
25 AmerisourceBergen." You negotiated an agreement with the

1 DEA and you made a promise down here, Paragraph A,  
2 "AmerisourceBergen agrees to maintain a compliance program  
3 designed to detect and prevent diversion of controlled  
4 substances," and it shall apply to all of your facilities in  
5 America. Do you agree with that?

6 **A.** Yes.

7 **Q.** And this is the, this is the spawning of the 2007 OMP  
8 program; correct?

9 **A.** Correct.

10 **Q.** So following the, this agreement, following the MOU,  
11 are you aware of correspondence between your counsel and the  
12 DEA regarding effectuating this settlement agreement and the  
13 implementation of your new OMP program?

14 **A.** There was communication, yes.

15 **Q.** I'm sorry?

16 **A.** There was -- I'm not sure what you're referencing to.

17 MR. FARRELL: Judge, may I approach?

18 THE COURT: Yes.

19 BY MR. FARRELL:

20 **Q.** I'm going to hand you what's marked as P-877.

21 **A.** Thank you.

22 **Q.** When you get a chance, Mr. Zimmerman, tell me when  
23 you're ready.

24 **A.** Okay.

25 **Q.** What is this document, Mr. Zimmerman, if you know?

1       **A.**     It's a letter from a Reed Smith attorney to Linden  
2       Barber, an attorney at DEA.

3       **Q.**     So have you seen this letter before today?

4       **A.**     I have.

5       **Q.**     In fact, you were courtesy-copied on this letter;  
6       correct?

7       **A.**     Yes.

8       **Q.**     This is a communication by AmerisourceBergen through  
9       its counsel to the DEA's counsel regarding the  
10      implementation of the promises you made in the settlement  
11      agreement. Agreed?

12      **A.**     Yes.

13               MR. FARRELL: Judge, I'd ask for P-877 to be  
14      admitted into the record.

15               THE COURT: Any objection?

16               MR. NICHOLAS: No objection.

17               MR. HESTER: No objection, Your Honor.

18               THE COURT: All right. It's admitted.

19      BY MR. FARRELL:

20      **Q.**     Now, when you look at it, the first paragraph, it  
21      basically sets up the premise that, hey, we had these  
22      discussions. We're going to talk about the  
23      implementation of the agreement. Correct?

24      **A.**     Yes.

25      **Q.**     And then the second paragraph is the one that says, "To

1 begin, as noted in the telephone voicemail message to me  
2 from Larry Cote --" I don't know how you pronounce that.

3 **A.** Cote.

4 **Q.** Cote?

5 **A.** Yeah.

6 **Q.** So do you know who Larry Cote is?

7 **A.** Yes.

8 **Q.** Do you know who Linden Barber is?

9 **A.** Yes.

10 **Q.** In 2007 what were they to you?

11 **A.** Linden Barber was the senior attorney and Larry Cote  
12 was the, was also an attorney within DEA. They were  
13 involved in all the negotiations.

14 **Q.** So they were the -- they were the United States  
15 Attorneys that were prosecuting AmerisourceBergen in 2007;  
16 correct?

17 **A.** They were -- I don't think -- they weren't U.S.  
18 Attorneys. They were in the -- let's see. What does it  
19 say? They were in the Office of Diversion and Regulatory  
20 Litigation Section of the DEA. Maybe -- I'm sorry. I'm not  
21 an attorney, so maybe that's -- I don't think they worked  
22 for the U.S. Attorney's Office. I think they were employed  
23 by the DEA which is I guess a subset of the DOJ but --

24 **Q.** Right. But later on did your relationship turn from  
25 adversarial to collaborative with both Mr. Barber and Mr.

1 Cote?

2 **A.** Adversarial -- I mean, we worked together to resolve  
3 the issue. But if you mean adversarial because they were on  
4 the DEA side and we were on the industry side, and I think  
5 they've since left the DEA but, I mean, my relationship with  
6 them didn't change.

7 **Q.** Now they work for your industry, do they not?

8 **A.** Linden I believe may. Larry I believe worked for a law  
9 firm. I'm not sure.

10 **Q.** Okay. So going to this, it basically says in this  
11 second paragraph that the DEA has had frequent direct  
12 telephone contact with Chris Zimmerman, Vice President for  
13 Corporate Security and Regulatory Affairs, to implement the  
14 technical exchange, the technical exchange of electronic  
15 information which AmerisourceBergen is to provide to the DEA  
16 under the agreement. Did I read that accurately?

17 **A.** Yes.

18 **Q.** Now, during this time of your frequent direct telephone  
19 contact with the DEA, did you communicate to them your  
20 disagreement with the Rannazzisi letter?

21 **A.** No.

22 **Q.** Did you communicate with them your disagreement of  
23 their interpretation of the regulatory requirements outlined  
24 in the Immediate Suspension Order?

25 **A.** No.

1 Q. Go to the bottom paragraph.

2 MR. FARRELL: I'm going to try to get through this  
3 document quickly, Judge.

4 BY MR. FARRELL:

5 Q. Let's go to the next page. You don't need to blow  
6 up the next page. It's right here. What I'm going to  
7 point to is I'm going to point to the top paragraph  
8 here. I'm going to read it for you.

9 "As AmerisourceBergen and DEA have agreed, the local  
10 distribution center will review such orders in a timely  
11 fashion in order to determine whether or not the order  
12 appears to be legitimate, notwithstanding the automated  
13 system having flagged the order."

14 Did I read that correctly?

15 A. Yes.

16 Q. It goes on to say such orders that get flagged but then  
17 after diligent review get released need not be reported to  
18 the DEA; correct? That's the rest of that paragraph.

19 A. Correct.

20 Q. The DEA is telling you that if you flag it and then  
21 eyeball it and clear it, you don't need to report it. We  
22 don't need voluminous reports of everything you flagged.  
23 Agreed?

24 A. Correct.

25 Q. Now, next paragraph says, "Any orders which the local



1 distribution center cannot confirm as legitimate are to be  
2 held and not shipped to the customers pending more in-depth  
3 inquiry by ABDC's national CSRA investigatory group."

4 Did I read that accurately?

5 **A.** Yes.

6 **Q.** You promised the DEA in 2007 that you would block  
7 suspicious orders until they're cleared by due diligence,  
8 didn't you?

9 **A.** That was the program we designed. If they cleared it  
10 at the DC, they could ship it. And I'm not sure what your  
11 question is.

12 **Q.** We just argued earlier about whether or not you had a  
13 duty to block shipments of suspicious orders. Your position  
14 is you do not. Agreed?

15 **A.** My position as -- was written as the Code of Federal  
16 Regulations is written. I also wouldn't categorize it as  
17 arguing with you.

18 **Q.** That's fair.

19 **A.** Okay.

20 **Q.** I apologize for that reference. Your position,  
21 succinctly stated, is that this block of suspicious orders  
22 isn't written in the code; correct?

23 **A.** Correct.

24 **Q.** And the DEA believes it's inferred in the law and that  
25 it's a duty for you to maintain effective control. Is that

1 succinctly stated?

2 MR. HESTER: Object to the form, Your Honor. It's  
3 asking for speculation of the DEA's position.

4 THE COURT: Sustained.

5 BY MR. FARRELL:

6 Q. The DEA's position is stated in the Prevoznik depo.  
7 We'll leave that alone. Nonetheless, you promised the  
8 DEA in 2007 you would block suspicious orders?

9 A. I agree this is the, this is the -- that was part of  
10 the agreement, correct.

11 Q. That was a promise made by you at AmerisourceBergen  
12 that you would start blocking suspicious orders?

13 A. Correct.

14 Q. Go to the paragraph, "The remaining orders."

15 THE COURT: When you get to a stopping place, Mr.  
16 Farrell, we'll have to adjourn until tomorrow.

17 MR. FARRELL: I was just getting a roll going,  
18 Judge. This will be the last document for the day, Judge.

19 THE COURT: Okay.

20 MR. FARRELL: There may be one more if I can beg  
21 your leniency.

22 BY MR. FARRELL:

23 Q. This last paragraph here, Mr. Zimmerman, "The  
24 remaining orders," flagged orders, "will be investigated  
25 under your direction and will not be shipped unless they

1 can be confirmed as bona fide."

2 That's the promise made to the DEA as of July 11th,  
3 2007. Agreed?

4 **A.** That -- this was the letter that they were discussing.  
5 Keep in mind that the agreement was signed in June, but we  
6 didn't -- they didn't release our license in August. So  
7 from June to August we were going back and forth designing  
8 the system, you know, the every day phone calls with Mike  
9 Mapes.

10 And then pursuant at the completion of the process,  
11 they would inspect our facilities and then release our  
12 license.

13 So what's in this letter is communication from Efrem to  
14 Linden. I wouldn't say it's black and white at this point,  
15 not until they released the license was the system  
16 completed.

17 We were still -- like I said, it was a brand new system  
18 that we were putting in place for nationwide. It was a  
19 complete shift in the industry at that time.

20 **Q.** And this shift you acted on by making a promise to the  
21 DEA as set forth in July of 2007?

22 **A.** We made an agreement, yeah.

23 **Q.** And, so, what you said was give us our license back.  
24 We will do this.

25 **A.** We will put the system in place. You will inspect it

1 and approve -- once you approve our system that we put in  
2 place in August, then they'll give us our license back.

3 **Q.** And 24 years later you -- no, that's not right. 14  
4 years later you still disagree with the position taken by  
5 the DEA?

6 **A.** It's -- again, I think my interpretation -- I think the  
7 interpretation is one of -- one to protect the supply chain,  
8 have adequate control for the diversion, but also keeping in  
9 mind the patients that needed the product.

10 These are FDA approved drugs. Everyone is licensed  
11 along the supply chain. They each have their  
12 responsibilities.

13 Was the suspicious order meant to block it? Then why  
14 didn't they say you can't ship suspicious orders in the Code  
15 of Federal Regulations? Or was it alert DEA that there  
16 could be a suspicious circumstance so we can investigate?

17 I don't -- again, it was written in 1970. Rannazzisi  
18 sent some letters giving his opinion of it. We worked with  
19 DEA for two years, had a different opinion of it.

20 There's other issues that I'm sure are going to come up  
21 through this case. You're going to see other opinions on  
22 the suspicious order process.

23 So it's, it's a very vague requirement. It's, you  
24 know, it's not black and white, so there's a lot open to  
25 interpretation.

1       **Q.**    Mr. Zimmerman, 14 years later you still disagree with  
2       the DEA?

3       **A.**    That's the program we have in place.

4       **Q.**    One last time.  14 years later, you still disagree with  
5       the DEA?

6       **A.**    I disa- -- I agree, or I feel the regulation was  
7       written as such to report suspicious orders and not to stop.  
8       It doesn't mean you can't stop the orders, but I just don't  
9       see that requirement in the Code of Federal Regulations when  
10      I read it.

11      **Q.**    You disagree with the DEA still 14 years later?

12               MR. NICHOLAS:  I object.

13               THE COURT:  It's been asked and answered about  
14      three times, Mr. Farrell.

15               I think this is a good place to stop until tomorrow  
16      morning.

17               MR. FARRELL:  Yes, sir.

18               THE COURT:  I'll see everybody at 9:00.

19               (Trial recessed at 5:06 p.m.)  
20  
21  
22  
23  
24  
25

## 1 CERTIFICATION:

2 I, Ayme A. Cochran, Official Court  
3 Reporter, and I, Lisa A. Cook, Official Court Reporter,  
4 certify that the foregoing is a correct transcript from  
5 the record of proceedings in the matter of The City of  
6 Huntington, et al., Plaintiffs vs. AmerisourceBergen  
7 Drug Corporation, et al., Defendants, Civil Action No.  
8 3:17-cv-01362 and Civil Action No. 3:17-cv-01665, as  
9 reported on May 12, 2021.

10  
11 S\Ayme A. Cochran

12 Reporter

13 s\Lisa A. Cook

14 Reporter

15 —

16 May 12, 202117 Date  
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